UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 140. OCTOBER TERM, 1895.

THE HORACE B. PARKER.

JOHN CHISHOLM ET AL., CLAIMANTS, APPELLANTS,
v.
WILLIAM V. ABBOTT ET AL., LIBELLANTS, APPELLEES.

FINAL DECREE.

APRIL 23, 1896.

Upon consideration of the petition for rehearing, filed February 18, 1896, by the appellants, and of briefs filed by both parties, by leave of Court, in reference to the order for costs, entered in this cause, It is now, to wit, April 23, 1896, ordered, adjudged and decreed, as follows: —

Ordered, that whereas no judge who concurred in the judgment desires that the petition for a rehearing be granted, except as to the matter of costs, the same is denied except as to costs; and whereas both parties have, by leave of Court, been heard on briefs on the matter of costs, it is further ordered that the judgment heretofore entered be rescinded, and judgment be now entered as follows:

The decree of the District Court is reversed and the case is remanded to that court, with directions to enter a decree, dividing equally the damages and costs in that court, with costs for the appellants in this court.

By the Court,

JOHN G. STETSON, *Clerk.*

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1895.

No. 140.

THE HORACE B. PARKER.

JOHN CHISHOLM ET AL., CLAIMANTS, APPELLANTS,
v.
WILLIAM V. ABBOTT ET AL., LIBELLANTS, APPELLEES.

MOTION TO AMEND THE ANSWER.

[FILED MAY 15, 1896.]

John Chisholm and William H. Thomas, the claimants, appellants in the case above named, respectfully petition this Court to allow them to amend their answer in said case as follows, viz: —

1. By striking from the Third Article thereof the words "that there was a heavy vapor or mist at the time, and the night was very thick".

2. By striking from the Fourth Article thereof the words "did not sound a fog horn or use any other signal required by law under the circumstances".

— and thereupon to dismiss said libel; or, if the granting of said motion, as above prayed, is not within the power of this Court, to remand the case to the District Court with directions to that Court to allow said amendments, and to dismiss said libel.

By their Proctors,

JOHN LOWELL,
EDWARD S. DODGE,
JOHN J. FLAHERTY.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1895.

No. 140.

THE HORACE B. PARKER.

JOHN CHISHOLM ET AL., CLAIMANTS, APPELLANTS,
v.
WILLIAM V. ABBOTT ET AL., LIBELLANTS, APPELLEES.

PETITION TO THE COURT TO CERTIFY CERTAIN QUESTIONS OF LAW.

[FILED MAY 15, 1896.]

John Chisholm and William H. Thomas, the claimants, appellants in the case above named, respectfully request the Circuit Court of Appeals to certify to the Supreme Court of the United States for its decision the following questions.

They request the Court to certify the question:

1. Whether, when the answer of the claimants, in a cause of collision, in admiralty, contains an allegation that there existed vapor or mist at the time of said collision (said allegation not being responsive to any of the allegations of the libel, and not being admitted by the libellants), and charges that the libellants were negligent (among other acts of negligence) in that they did not sound a fog horn, said answer being sworn to upon information and belief only, and it appearing from the testimony that the claimant who so verified the answer had no personal knowledge of the facts so alleged, said allegation, or charge of the negligence of the libellants, constitutes a conclusive admission of negligence on the part of the

claimants, if they failed to sound a fog horn, although the testimony in the case negatives the existence of said vapor or mist.

They also request the Court to certify the question:

2. Whether, in said cause, the Court of Appeals having held the vessel of the libellants in fault for failure to exhibit proper side lights, the vessel of the claimants should be condemned for one half of the damages in said cause, because of the allegation and charge in the answer, above stated, although the testimony in the case failed to prove said allegation.

They also request the Court to certify the question:

3. Whether, under the circumstances stated in question 1, above, the Court of Appeals is justified in refusing to examine the evidence of the existence or non-existence of said vapor or mist.

By their Proctors,

JOHN LOWELL,
EDWARD S. DODGE,
JOHN J. FLAHERTY.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 140. October Term, 1895.

THE HORACE B. PARKER.

Appeal from the District Court for the District of Massachusetts.

Before Colt, Putnam and Nelson, JJ.

OPINION AND ORDER OF THE COURT.

May 22, 1866.

Per Curiam. With reference to the petition for leave to apply to the District Court for permission to amend, the allegations sought to be amended were framed with such deliberation as they now stand, that, at the hearing of the cause in this court, they were insisted on by the petitioners, both orally and in their brief. There is no equity in the application.

If we have the power, after judgment, to certify this case to the Supreme Court,—*Columbus Watch Company* v. *Robbins*, 148 U. S. 266,—we see in it no such peculiarities as render it appropriate that we should do so. It is full time the litigation in this court should cease.

The petitions that leave to amend may be reserved, and for a certificate to the Supreme Court, are denied.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 140. OCTOBER TERM, 1895.

THE HORACE B. PARKER.

JOHN CHISHOLM ET AL., CLAIMANTS, APPELLANTS,
v.
WILLIAM V. ABBOTT ET AL., LEBELLANTS, APPELLEES.

ORDER OF COURT.

MAY 22, 1896.

Upon consideration of the motion to amend the answer, etc., and of the petition to the Court to certify questions of law, filed May 15, 1896, by the appellants, by leave of Court,

Ordered as follows: The petitions that leave to amend may be reserved and for a certificate to the Supreme Court, are denied.

By the Court,

JOHN G. STETSON, *Clerk.*

that said pages above named, containing true copies thereof, contain and are a true copy of the record and all proceedings in said cause, in said United States Circuit Court of Appeals, to and including May 28, 1896, and that the issuing of the mandate upon said final decree of April 23, 1896, has been stayed till the further order of Court.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this twenty-eighth day of May, 1896.

[L. S.]

John G. Stetson,

Clerk.

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1895.

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No. 160.

THE STEAM TOWBOAT NO. 1, NORFOLK AND WESTERN.

MERCHANTS AND MINERS TRANSPORTATION COMPANY,
LIBELLANT, APPELLANT,
v.
NORFOLK AND WESTERN RAILROAD COMPANY,
CLAIMANT, APPELLEE.

No. 161.

THE BERKSHIRE.

MERCHANTS AND MINERS TRANSPORTATION COMPANY,
CLAIMANT, APPELLANT,
v.
NORFOLK AND WESTERN RAILROAD COMPANY ET AL.,
LIBELLANTS, APPELLEES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND,
FROM FINAL DECREES (CARPENTER, J.), NOVEMBER 15, 1895.

CERTIFIED COPY

OF

RECORDS AND ALL PROCEEDINGS IN SAID CAUSES,
TO AND INCLUDING SEPTEMBER 30, 1896.

EUGENE P. CARVER,
EDWARD E. BLODGETT, *for Appellants.*
WILLIAM G. ROELKER, *for Appellees.*

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1895.

No. 160.

THE STEAM TOWBOAT NO. 1, NORFOLK AND WESTERN.

MERCHANTS AND MINERS TRANSPORTATION COMPANY,
LIBELLANT, APPELLANT,
v.
NORFOLK AND WESTERN RAILROAD COMPANY,
CLAIMANT, APPELLEE.

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WILLIAM G. ROELKER, *for Appellees.*

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1895.

No. 160.

THE STEAM TOWBOAT NO. 1,
NORFOLK AND WESTERN.

MERCHANTS AND MINERS TRANSPORTATION COMPANY,

LIBELLANT, APPELLANT,

v.

NORFOLK AND WESTERN RAILROAD COMPANY,

CLAIMANT, APPELLEE.

No. 161.

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WILLIAM G. ROELKER, *for Appellees.*

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1895.

No. 160.

THE STEAM TOWBOAT NO. 1, NORFOLK & WESTERN.

MERCHANTS & MINERS TRANSPORTATION COMPANY,
LIBELLANT, APPELLANT,
v.
NORFOLK & WESTERN RAILROAD COMPANY,
CLAIMANT, APPELLEE.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

[FILED DECEMBER 18, 1895.]

At a term of the District Court of the United States for the District of Rhode Island, begun and holden at Providence, in and for the said District, on the fifteenth day of October, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable GEORGE M. CARPENTER, *District Judge.*

ADMIRALTY NO. 1019.

MERCHANTS & MINERS TRANSPORTATION COMPANY
v.
STEAM TOWBOAT NO. 1, NORFOLK & WESTERN.

The libel in this cause was filed on the seventeenth day of August, 1893, and is in the following words and figures, viz:-

LIBEL.

To the Honorable George M. Carpenter, *Judge of the District Court of the United States for the District of Rhode Island:*

The libel and complaint of the Merchants & Miners Transportation Company, a corporation duly created and organized under the laws of the State of Maryland, and a citizen of said State of Maryland, and doing business in said State and in the State of Rhode Island as carrier by water between ports in said State of Maryland and elsewhere and the port of Providence in the State of Rhode Island, and being the owner of the steamer Berkshire (whereof Luther E. Hooper is master), and the owner of the tackle, apparel and furniture, against the steam towboat No. 1, Norfolk & Western, belonging to the Norfolk & Western Railroad Corporation, whereof .... was lately or now is master, her tackle, apparel and furniture, and against all persons lawfully intervening for their interest therein, in a cause of collision, civil and maritime.

And the said libellant alleges and articulately propounds as follows:

That at 2.30 o'clock P. M., Aug. 16, 1893, the said steamship Berkshire left its wharf at Providence with a general cargo, bound for Norfolk, Va., the weather at the time being cloudy, the wind east, and the tide ebbing. That the said Berkshire was about two hundred and fifty-eight feet long, staunch and well built and in good order, and had on board her ordinary crew and officers and servants. That said crew, officers and servants were a full complement of men to navigate said vessel. That as the said Berkshire was rounding Sabins Point, about five miles south of Providence, the said Berkshire being then and there on the tide waters of Narragansett Bay within the ebb and flow of the tide and within the admiralty and maritime jurisdiction of this court, it met said towboat No. 1, Norfolk & Western, towing barge No. 4, Norfolk & Western, bound for the port of Providence. That the tow rope connecting the said barge with said towboat was long and that the said towboat instead of being lashed alongside the said barge was towing the same with a long tow line. That said barge was laden with coal and that the channel at said point is narrow. That the said Berkshire passed the said towboat keeping it on the starboard, but owing to the long hawser connecting the towboat and the barge, which hawser was for a tow in that place unnecessarily and dangerously long, the said Berkshire though carefully managed and at the time of the collision with reversed engines could not clear the barge notwithstanding the helm of the Berkshire was put hard astarboard, but the said barge in spite of all efforts possible on the part of said Berkshire ran into and collided with the said Berkshire, striking its bow with great force, crushing holes in the bow of the Berkshire and breaking the iron plates of its bow and the iron ribs behind said plates and causing damage which compelled the Berkshire to return to Providence. That the damage to the Berkshire so caused by the fault of the said steam towboat is $10,000 which is the damage sustained by the libellant through the fault of said steam towboat. That the said collision and damage was due to and caused by the carelessness and bad management of the said tug in towing said barge with a long hawser through the narrow channel instead of being lashed alongside said barge or of using a short hawser for towing.

That all and singular the matters and premises are within the admiralty and maritime jurisdiction of this court, in proof of which, if denied, the libellant craves permission to refer to the depositions and proofs to be by said libellant exhibited in this cause.

Wherefore the libellant prays that process in due form of law, according to the course of courts of admiralty and of this court in cases of admiralty and maritime jurisdiction, may issue against said steam towboat No. 1, Norfolk & Western, now lying in the port of Providence, within the District of Rhode Island and the jurisdiction of this court, her tackle, apparel and furniture, and that all persons having or pretending to have any right, title or interest therein may be cited to appear and answer all and singular the matters herein propounded, and that this court may pronounce for the damages aforesaid, and may decree such other relief to the libellant as may be required by law and justice, and may condemn the said steam towboat No. 1, Norfolk & Western, her tackle, apparel and furniture, and all persons intervening, for their interest therein in costs.

MERCHANTS & MINERS
TRANSPORTATION CO.,
by ELLERTON P. WHITNEY, *Director.*

STATE OF RHODE ISLAND, ETC.
CITY OF PROVIDENCE.

Before me, a notary public for said State, this Aug. 17, 1893, personally appeared before me in Providence, James W. McCloskey, and made oath that he is agent in Providence of the Merchants & Miners Transportation Company, the above libellant, and that the statements in the above libel are true.

[L. S.] ARNOLD GREEN, *Notary Public.*

LIBELLANT'S STIPULATION FOR COSTS.

[FILED AUG. 17, 1893.]

The Merchants & Miners Transportation Company, a corporation duly created and organized under the laws of Maryland, as principal, and Royal C. Taft, of the city of Providence and State of Rhode Island, as surety, hereby for the benefit of whomsoever it may concern stipulate and agree that

Whereas the said corporation has this day filed its libel in a cause civil and maritime against the steamtug No. 1, Norfolk & Western, in the District Court of the United States for the District of Rhode Island, now in pursuance of an order made in said cause the Merchants & Miners Transportation, as principal, and the said Taft, as surety, stipulate and agree that in the sum of five thousand dollars execution may issue against them and each of them in case the said Merchants & Miners Transportation Company shall fail on demand to pay all judgments, costs and damages, which in the case of said libel may be awarded or adjudged against it, said execution to issue from the said District Court of the United States for said District of Rhode Island and for such sum and for the benefit of such persons as said court in said libel may adjudge. This stipulation to be binding on said principal and surety, its successors and his executors, administrators, in a sum not to succeed in the aggregate ($5,000) five thousand dollars.

Witness the seal of the said company and the hand and seal of said Taft hereto set this Aug. 17, 1893, in the city of Providence.

MERCHANTS & MINERS
TRANSPORTATION CO., [SEAL]
by ELLERTON P. WHITNEY, *Director*.
ROYAL C. TAFT. [SEAL]

Signed and sealed in presence of
ARNOLD GREEN.

WARRANT AND MONITION.

[ISSUED AUG. 17, 1893.]

UNITED STATES OF AMERICA,
DISTRICT OF RHODE ISLAND.

[L. S.] THE PRESIDENT OF THE UNITED STATES OF AMERICA,
To the Marshal of said District or to his Deputy, GREETING:

Whereas a libel hath been filed in the District Court of the United States for the District of Rhode Island, on the seventeenth day of August, A. D. 1893, by the Merchants & Miners Transportation Company, a corporation duly created and organized under the laws of the State of Maryland and a citizen of said State, and being the owner of the steamer Berkshire (whereof Luther E. Hooper is master) and the owner of her tackle, apparel and furniture, against the steam towboat No. 1, Norfolk & Western, belonging to the Norfolk & Western Railroad Corporation, her tackle, apparel and furniture, and against all persons lawfully intervening for their interest therein in a cause of collision civil and maritime for the reasons and causes in said libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said steam towboat No. 1, Norfolk & Western, her tackle, apparel and furniture, may be cited in general and special to answer the premises and all proceedings being had, that the said steam towboat No. 1, Norfolk & Western, her tackle, apparel and furniture, may, for the causes in said libel mentioned, be condemned and sold as prayed for in said libel.

You are therefore commanded to attach said steam towboat No. 1, Norfolk & Western, her tackle, apparel and furniture, and to detain the same in your custody until further order of Court, and to give due notice to all persons claiming the same, or having anything to say why the same should not be sold pursuant to the prayer of said libel, that they appear before said court to be held at Providence, in and for said District, on the first day of September, A. D. 1893, at ten o'clock A. M., then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises, do you then and there make return thereof, together with this writ.

Witness, the Honorable GEORGE M. CARPENTER, Judge of said court, at Providence, in said District, this seventeenth day of August, A. D. 1893.

WILLIAM P. CROSS, *Clerk.*

MARSHAL'S RETURN.

At PROVIDENCE, Aug. 17, A. D. 1893.

In obedience to the within monition, I attached the said steam towboat No. 1, Norfolk & Western, her tackle, apparel and furniture, and have given due notice to all persons claiming the same, by advertising the substance of this monition in the Providence *Journal*, and by posting a certified copy thereof on steam towboat No. 1, Norfolk & Western.

Fees, $35.56.

JOHN ANDERSON,
Deputy U. S. Marshal.

CLAIM.

[FILED AUG. 25, 1893.]

To the Honorable GEORGE M. CARPENTER, *Judge of the District Court for the District of Rhode Island:*

The Norfolk & Western Railroad Company, a corporation duly incorporated under the laws of the State of Virginia and doing business in Virginia and elsewhere, owner of the steamtug N. & W. 1, her tackle, apparel and furniture, intervening for its interest in the said steamtug N. & W. 1, her tackle, apparel and furniture, appear before this Honorable Court and claim the said steamtug, her tackle, apparel and furniture, and states that it is the true and *bona fide* owner thereof, and that no other person is the owner thereof.

And thereupon the said claimant prays that this Honorable Court will be pleased to decree a restitution of the same to it, and otherwise right and justice to administer in the premises.

NORFOLK & WESTERN RAILROAD COMPANY,
by F. J. KIMBALL, *President.* [SEAL]
WM. G. MACDONALD, *Treasurer.*

Attest: A. J. HEMPHILL, *Secretary.*

Subscribed and sworn to this twenty-fourth day of August, A. D. 1893.

Before me,

[SEAL] WM. W. CRAIG,
Commissioner of the Circuit Court of the United States, Eastern District of Pennsylvania.

CLAIMANT'S BOND FOR COSTS.

[FILED AUG. 25, 1893.]

Whereas, a libel was filed in this court on the seventeenth day of August, A. D. 1893, by the Merchants & Miners Transportation Company, a corporation duly incorporated under the laws of the State of Maryland, and doing business in the city of Providence in said District of Rhode Island, against the steam towboat No. 1, N. & W., her tackle, apparel and furniture, for the reasons and causes in said libel mentioned;

And whereas, a claim has been filed in the said cause by the Norfolk & Western Railroad Company, a corporation created under the laws of the State of Virginia, and located and doing business in Virginia and elsewhere, and the said Norfolk & Western Railroad Company and William G. Macdonald, of Philadelphia, Pa., its surety, the parties hereto hereby consenting that in default of contumacy on the part of the claimant or its surety, execution for the sum of two hundred and fifty dollars may issue against their goods, chattels and lands:

Now, therefore, it is stipulated and agreed for the benefit of whom it may concern, that the stipulators undersigned are and each of them is hereby bound in the sum of two hundred and fifty dollars, conditioned that the claimant above named shall pay all costs and expenses which shall be awarded against it by the final decree of this Court, or upon appeal by the Appellate Court.

NORFOLK & WESTERN RAILROAD COMPANY,
by F. J. KIMBALL, *President*. [SEAL]
WM. G. MACDONALD. [SEAL]

Attest: A. J. HEMPHILL, *Secretary*.

Taken and acknowledged this twenty-fourth day of August, 1893.

Before me,

WM. W. CRAIG,
Commissioner Circuit Court,
Eastern District of Pennsylvania.

EASTERN DISTRICT OF PENNSYLVANIA.

Wm. G. Macdonald, party to the above stipulation, being duly sworn, deposes and says that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

WM. G. MACDONALD.

Subscribed and sworn to this twenty-fourth day of August, 1893.

Before me,

[SEAL] WM. W. CRAIG,
Commissioner of the Circuit Court of the United States for the Eastern District of Pennsylvania.

AUG. 25, 1893.

The foregoing is satisfactory to the libellant.

ARNOLD GREEN, *Proctor.*

STIPULATION FOR VALUE.

[FILED AUG. 25, 1893.]

In the above-entitled cause it is agreed that the value of said steamtug 1, N. & W., is the sum of ten thousand (10,000) dollars, and that said steamtug may be delivered up to the complainants on filing in the clerk's office of this court a stipulation in that amount.

ARNOLD GREEN, *Proctor for Libellant.*
WM. G. ROELKER, *Proctor for Libellees.*

CLAIMANT'S BOND ON DELIVERY.

[FILED SEPT. 7, 1893.]

Whereas, a libel was filed on the seventeenth day of August, A. D. 1893, by the Merchants & Miners Transportation Company, a corporation duly incorporated under the laws of the State of Maryland and doing business in the city of Providence in said District of Rhode Island, against the steam towboat No. 1, N. & W., her tackle, apparel and furniture, for the reasons and causes in said libel mentioned;

And, whereas, the same is now in the custody of the marshal under the process issued in pursuance of the prayer of said libel, and is of the value of ten thousand dollars, as appears by the consent now on file in said court, and the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the claimant or its surety execution may issue against their goods, chattels and lands;

Now, therefore, it is hereby stipulated and agreed for the benefit of whom it may concern, that the stipulators undersigned, and each of them, is bound in the sum of ten thousand dollars, conditioned that they shall at any time upon the interlocutory or final order or decree of the said District Court, or of notice of such order or decree to said claimant or its proctor, pay into court the full value aforesaid, and abide by and pay the money awarded by final decree rendered by this Court, or the Appellate Court if any appeal intervene.

Attest: NORFOLK & WESTERN
A. J. HEMPHILL, RAILROAD COMPANY,
Secretary. *by* F. J. KIMBALL, *President.* [SEAL]

Attest: THE GUARANTEE COMPANY
ROBERT KERR, OF NORTH AMERICA,
Acting Secretary. *by* E. RAWLINGS, *President.* [SEAL]

WARRANT OF DELIVERY.

[ISSUED AUG. 25, 1895.]

[L. S.] THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Marshal of said District or to his Deputy, GREETING:

Whereas, the steam towboat N. & W. No. 1, her tackle, apparel and furniture, boats, boilers, engines and propeller, claimed by the Norfolk & Western Railroad Corporation, has been agreed to be delivered up to the claimant aforesaid upon a stipulation being filed in the clerk's office of said court for the sum of ten thousand dollars, conditioned to abide by and pay the money awarded by the final decree of this Court, or upon appeal by the Appellate Court, and such a stipulation having been filed in said office:

You are therefore hereby directed to cause said steam towboat N. & W. No. 1, her tackle, apparel and furniture, boats, boilers, engines and propeller, to be delivered up to the claimant aforesaid upon his signing a receipt therefor upon the back of this warrant, and make your return of this warrant with your doings therein at said clerk's office.

Witness, the Honorable GEORGE M. CARPENTER, our District Judge, at Providence in said District, this twenty-fifth day of August, A. D. 1893.

WILLIAM P. CROSS, *Clerk.*

RECEIPT FOR VESSEL.

DISTRICT OF RHODE ISLAND. PROVIDENCE, Aug. 25, 1893.

Received of John E. Kendrick, United States Marshal, the steamtug N. & W. 1, her tackle, apparel and furniture, boats, engines and propeller in as good order and condition as when attached by him.

O. S. BAKER, *Master*.

MARSHAL'S RETURN TO WARRANT OF DELIVERY.

PROVIDENCE, Aug. 25, 1893.

I have this day served this warrant and have delivered the within named steamtug N. & W. 1, her tackle, apparel and furniture, boats, engines and propeller, to O. S. Baker, master for said defendant corporation, and have his receipt therefor herewith,

JOHN ANDERSON, *Dept. U. S. Marshal.*

CLAIMANT'S ANSWER.

[FILED SEPT. 26, 1895.]

The Answer of the Norfolk & Western Railroad Company, a corporation duly created under the laws of the Commonwealth of Virginia, and located and doing business in said Commonwealth and elsewhere, claimant and owner of the steam towboat N. & W. 1, to the libel and complaint of the Merchants & Miners Transportation Company, owners of the steamship Berkshire, against the said steam towboat N. & W. 1, her boats, tackle, apparel and furniture, engines and propeller. And answering said libel this respondent alleges and articulately propounds as follows: —

First. It admits that at or about 2.30 P. M., Aug. 16, 1893, the steamship Berkshire left her wharf at Providence bound for Norfolk, Va.; it admits that when the said steamship was near Sabins Point Light, and then and there in the tide waters of Narragansett Bay, within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of this court, it met the steam towboat N. & W. 1, towing barge N. &. W. 4, bound for the port of Providence; it admits that said towboat was towing said barge with a tow line and that said barge was laden with coal; and it admits that said steamship Berkshire passed said steam towboat, keeping it on the starboard.

It denies, however, that the tow rope, connecting said barge with the towboat was long, or that for that place it was unnecessarily or dangerously long, and it denies that said steamship Berkshire, though carefully managed and at the time of the collision with reversed engines, could not clear the barge, though the helm of the Berkshire was put hard astarboard; it further denies that said barge in spite of all efforts possible on the part of said Berkshire ran into and collided with the said Berkshire.

And it alleges that at the time of said collision the weather was fair and clear, the wind about northeast, and the tide more than half ebb. As to all other allegations, matters and statements in said first article in said libel contained this libellee neither admits nor denies the same but leaves the libellant to prove the same as it may be advised.

Second. It denies that the said collision and damages was due to and caused by the carelessness and bad management of said tug in towing said barge with a long hawser through the narrow channel instead of being lashed alongside said barge, or of using a short hawser for towing; and as to the other allegations, matters and statements in said second article contained, this respondent does not know whether or not they are true, and it therefore neither admits nor denies the same, but leaves the libellant to prove them, if material, except it denies that any damage was caused to said Berkshire through the fault of the towboat; and on information and belief it denies that the damage sustained by the Berkshire by reason of said collision is as great as the sum of ten thousand dollars ($10,000).

Third. This libellee alleges that the facts of said collision are, for the most part, falsely and untruly stated in said libel, and that they were in fact as follows:

The steam tugboat N. & W. 1, with the barge N. & W. 4 in tow, on a harbor length of tow line, was coming at a slow rate of speed up the channel, against the wind and tide, on the easterly side of the channel, bound for the port of Providence; that when in the vicinity of Sabins Point Light the steamship Berkshire was seen coming down the channel at a considerable rate of speed, and being in the centre or west side thereof. The steamship was then some distance to the northward of Sabins Point Light, and passing the steamer Bay Queen, each passing on the port side of the other, having first exchanged signals of their intention to pass in that manner, to wit, each having given one short distinct blast in accordance with the rules in such case made and provided. Soon after the Berkshire had passed the Bay Queen in manner aforesaid, the tug N. & W. 1, in accordance with the law and her duty in that regard, signalled the steamship Berkshire of her intention to pass her in the same manner, by giving one short distinct blast of her whistle, and thereupon the tug ported her helm, kept to the eastward, and continued to hold her course to the right-hand or east side of the channel for that purpose; that the steamship Berkshire did not answer said signal, as she was bound by law to do, and did not keep to the right and clear of the tug and her tow as she was bound by law to do, but on the contrary attempted to pass the tug on her starboard side, to wit, to pass to the eastward of her; that there was ample room for the steamship to have done this and to have escaped collision both with the tug and with the tow, but that she so steered as to head directly for the tug N. & W. 1, and when she was found swinging to a starboard helm, and was making and had made no signal whatever, those in charge of the navigation of the tug, perceiving that a collision was inevitable if the tug continued to hold her course that she had properly adopted, and was in law entitled to hold, at the last moment, and when a collision seemed imminent, being in great peril, and for the purpose of avoiding the immediate danger of such collision, the tug changed her course by steadying her helm and stopped her engine, and the Berkshire passed within a very few feet of the tug to the eastward of her, leaving the tug on her starboard hand; that up to this time the Berkshire had neither heeded the signal of the tug nor altered her course in accordance with the signal to avoid the same, nor done any other thing apparent to the tug to avoid the collision which the Berkshire's course seemed bound to bring about; that about the time of passing the tug she had apparently slowed down and reversed her engines, and was apparently attempting to escape collision with the barge by backing her engine, but did not do so, and she carelessly and negligently struck the said barge N. & W. 4, on the starboard side of the stem, inflicting such a wound upon her that in a few minutes she filled and sank somewhat to the westward and below the point at which she was struck, in about four and a half fathoms of water, where she now lies.

After striking the barge the Berkshire backed off and from the effect of backing her stern had swung more to the left and was further to the eastward than when she struck the barge, despite which she had sufficient room by afterwards going ahead to clear the sinking barge, pass under her stern, and return up the channel to Providence, to the westward of her, which she did, showing conclusively that if, after passing the tug, the Berkshire had gone ahead on her engine under a starboard helm, instead of backing (which threw her head towards and into the barge), there was space enough to have gone clear.

This libellee alleges that everything possible was done by the said steam towboat N. & W. 1 and those in charge of her navigation to avoid a collision; that there was ample room in the first instance for the said steamship to have cleared the said tug and her tow on either side of the channel, had she signalled so to do, and that said collision was wholly caused by the carelessness negligent and unseamanlike conduct of the steamship Berkshire and those in charge of her navigation, in that she disregarded the signal of the said tug N. & W. 1, and attempted to pass the said tug and her tow leaving her on her starboard side, instead of keeping to starboard and passing on her port hand as it was her duty in law to have done, and in that in attempting to pass to port leaving her on her starboard side, the said steamship did not keep sufficiently far to the eastward to escape collision with the tug and tow, which she might have done; and in that she was proceeding at an undue and unsafe rate of speed, and did not slow down or reduce her speed and stop in order and in time to avoid the collision which she might have done.

And this libellee alleges that the said steam towboat N. & W. 1 was necessarily delayed and detained in said port of Providence, to wit, ten days, by reason of said libel having been filed against her, and this libellee, her owner, lost the use and benefit of said steam towboat N. & W. 1, during that period, and that said loss will amount to a large sum, to wit, the sum of three thousand dollars, and this libellee prays to receive said sum from this libellant.

Fifth. All and singular the premises are true, and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, the respondent prays that said libel may be dismissed; it further prays that the Court will pronounce for its damages above set forth and order the same to be paid with costs.

NORFOLK & WESTERN RAILROAD COMPANY, [SEAL]
by F. J. KIMBALL, *President*.

Attest: A. J. HEMPHILL, *Secretary*.

W. G. ROELKER, *Proctor for Claimant*.

Subscribed and sworn before me, this eighth day of September, 1893.

WM. W. CRAIG,
Commissioner of the Circuit Court of the United States,
Eastern District of Pennsylvania.

This cause came on to be heard and was fully heard and argued by the proctors for the several parties hereto before the Honorable George M. Carpenter, Judge, who on the fifteenth day of November directed the entry of the following final decree:—

FINAL DECREE.

This cause having been heard by the Court, it is hereby ordered, adjudged and decreed that the libel be dismissed with costs.

And it is further ordered, adjudged and decreed that the claimant recover of the libellant as costs in the said cause, as taxed by the clerk, the sum of eleven hundred forty-two and thirty one-hundredths dollars.

And it is further ordered, adjudged and decreed that unless said decree for costs be satisfied or proceedings thereon be stayed thereon by appeal or otherwise, within the time or in the manner prescribed by the rules and practice of this Court, the stipulators for costs on the part of the claimant shall cause the engagement of their stipulations to be performed or show cause why execution should not issue against their goods, chattels and credits to the amount of such stipulation to enforce satisfaction of this decree in so far as that stipulation shall suffice.

Entered as the decree of this Court by order thereof this fifteenth day of November, 1895.

W. P. CROSS, *Clerk.*

A true record:

Attest: WILLIAM P. CROSS, *Clerk.*

PETITION FOR APPEAL AND ASSIGNMENTS OF ERRORS.

[FILED NOV. 19, 1895.]

The libellant, being aggrieved by the decree, rulings and findings of the United States District Court for the District of Rhode Island, hereby appeals from said decree, rulings and findings therein contained, and makes the following assignments of errors:

First. That the Court should have found that the collision occurred through no fault on the part of the steamship Berkshire and those in charge of her at the time of the collision.

Second. That the Court erred in holding that the said steamtug and the barge in tow were without fault, and that no action on their part in any way contributed to the collision.

Third. That the Court should have found that the collision and the damage resulting therefrom was caused wholly through the negligence of the steamtug N. & W. No. 1 and the barge N. & W. No. 4, owned by the Norfolk & Western Railroad Company, in proceeding up a narrow channel with such a long tow line between them.

Fourth. That the Court should have found that the collision and the damage resulting therefrom was caused wholly through the negligence of the said tug and tow in proceeding across a narrow channel in such a way as to block the channel of the river.

Fifth. That whereas the decree is for the respondents, said decree should have been for the libellants for full damages.

And for the failure of the Court to find in the manner prescribed, and for other reasons, the libellant prays that the decision of the

District Court for the District of Rhode Island may be reversed and that a decree may be given for the libellant in full damages against the respondents; and thereupon the libellant appeals from said decision and findings of the said District Court, according to law, to the Circuit Court of Appeals, and prays that this its appeal may be allowed.

MERCHANTS & MINERS
TRANSPORTATION CO.,
by CARVER & BLODGETT,
its Attorneys and Proctors.

BOND TO PARTY ON APPEAL.

[FILED NOV. 19, 1895.]

Know all men by these presents, That we, the Merchants & Miners Transportation Company, a corporation duly organized and existing under the laws of the State of Maryland and having a usual place of business in the District of Rhode Island, as principal, and Ellerton P. Whitney, of Milton in the District of Massachusetts, and James W. McCloskey, of Providence in the District of Rhode Island, as sureties, are held and firmly bound unto the Norfolk & Western Railroad Company in the full and just sum of two hundred and fifty dollars, to be paid to the said Norfolk & Western Railroad Company, its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this eleventh day of November in the year of our Lord one thousand eight hundred and ninety-five.

Whereas, lately at a District Court of the United States for the District of Rhode Island, in a suit in admiralty depending in said court between the Merchants & Miners Transportation Company and steam towboat No. 1, Norfolk & Western, a decree was entered against the said Merchants & Miners Transportation Company the Norfolk & Western Railroad Company, claimants, and the said Merchants & Miners Transportation Company, having obtained an appeal to remove said cause to the United States Circuit Court of

Appeals for the First Circuit, to reverse the decree in the aforesaid suit, and a citation directed to the said Norfolk & Western Railroad Company, citing and admonishing it to be and appear in the said United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the nineteenth day of November, 1895.

Now, the condition of the above obligation is such, that if the said Merchants & Miners Transportation Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its appeal good, then the above obligation to be void; else to remain in full force and virtue.

MERCHANTS & MINERS
TRANSPORTATION CO., [SEAL]
by ELLERTON P. WHITNEY, *Director.*
ELLERTON P. WHITNEY. [SEAL]
JAMES W. McCLOSKEY. [SEAL]

Approved: G. M. CARPENTER, J.

ORDER OF APPEAL.

[ENTERED NOV. 19, 1895.]

And now upon the application of the libellants for an appeal from the decree in this action, and upon the filing of assignments of errors and bond, it is ordered that said appeal be allowed and that the record in this case be transmitted to the Circuit Court of Appeals for the First Circuit.

By the Court,

WILLIAM P. CROSS, *Clerk.*

STIPULATION AS TO TESTIMONY.

[Filed Dec. 7, 1895.]

In the above-entitled case it is hereby agreed that the clerk may omit all testimony from the appeal record. The original exhibits on file in the District Court to be sent up to the Court of Appeals.

W. C. ROELKER,
Proctor for Claimant.
CARVER & BLODGETT,
Proctor for Libellant.

CITATION ON APPEAL.

The President of the United States,

To the Norfolk & Western Railroad Company, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the thirtieth day of November next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Rhode Island, wherein the Merchants & Miners Transportation Company is appellant and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George M. Carpenter, Judge of the District Court of the United States for the District of Rhode Island, this nineteenth day of November, in the year of our Lord one thousand eight hundred and ninety-five.

G. M. CARPENTER, J.

Service is hereby acknowledged this day of within citation.

NORFOLK & WESTERN R. R. CO.,
by W. G. Roelker,
Proctor and Solicitor.

Providence, Nov. 25 1895.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF RHODE ISLAND, SS.

I, William P. Cross, Clerk of the District Court of the United States for the District of Rhode Island within the First Circuit, certify that the foregoing is a true copy of the record and all proceedings in the cause in admiralty entitled,

No. 1019.

MERCHANTS & MINERS TRANSPORTATION CO.
v.
STEAM TOWBOAT NO. 1, NORFOLK & WESTERN,

in said District Court determined the petition for appeal, the assignment of errors, the bond to party on appeal and the order allowing said appeal, and also the original citation issued upon the appeal of the libellants in said cause, with the acknowledgment of service thereof thereon (except that the testimony is admitted in accordance with a stipulation, a copy of which is included in this transcript of record).

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Providence, in said District, this eleventh day of December, A. D. 1895.

[SEAL] WILLIAM P. CROSS, *Clerk.*

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1895.

No. 161.

THE BERKSHIRE.

MERCHANTS & MINERS TRANSPORTATION COMPANY,
CLAIMANT, APPELLANT,
v.
NORFOLK & WESTERN RAILROAD COMPANY ET AL.,
LIBELLANTS, APPELLEES.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

[Filed December 18, 1895.]

At a term of the District Court of the United States for the District of Rhode Island, begun and held at Providence, in and for the said District, on the fifteenth day of October in the year of our Lord one thousand eight hundred ninety-five.

Present: The Honorable George M. Carpenter, *District Judge.*

Admiralty No. 1021.

Norfolk & Western Railroad Company et al.
v.
Steamship Berkshire, etc.

The libel in this cause was filed on the sixth day of October, 1893, and is in the words and figures following, viz: —

LIBEL.

To the Honorable GEORGE M. CARPENTER, *Judge of the District Court of the United States for the District of Rhode Island:*

The Libel of the Norfolk & Western Railroad Company, a corporation duly created under the laws of the Commonwealth of Virginia, and located and doing business therein and elsewhere, owners of the barge N. & W. 4, and Samuel Castner, Jr., and Henry B. Curran, copartners, doing business under the firm name and style of Castner & Curran, in the city of Philadelphia, in the Commonwealth of Pennsylvania, owners of 1760 tons of coal laden aboard said Barge N. & W. 4, against the steamship Berkshire, her boats, tackle, apparel, furniture, boilers, engines, propeller, and all persons lawfully intervening for their interest in the same, in a cause of collision civil and maritime, allege as follows: —

First. That on the, to wit .... day of August, A. D. 1893, said Samuel Castner, Jr., and Henry B. Curran, copartners, doing business under the firm name and style of Castner & Curran, were the owners of a large quantity of coal, to wit, 1760 tons of Pocahontas coal, so called, of the value, to wit, four thousand five hundred dollars, at Norfolk, in the State of Virginia.

Second. That thereupon, on, to wit, the .... day of August, A. D. 1893, said coal was shipped at said Norfolk, Va., on the said barge N. & W. 4, to be carried on said barge to said port of Providence in said District of Rhode Island.

Third. That on the, to wit, ... day of August, A. D. 1893, said barge N. & W. 4, a vessel of, to wit, net 1063.69 tons burden, being tight, staunch and strong, well manned and equipped, having a crew of five men all told, with said 1760 tons of coal laden on board, was on said voyage from Norfolk, in the State of Virginia, to the port of Providence in said District of Rhode Island.

Fourth. That said N. & W. 4, having the coal aforesaid on board, was being towed by the steam tug N. & W. 1 on said voyage through Narragansett Bay, at a point in said bay called Sabins

Point, situated, to wit, ... miles from said Providence, on the afternoon of said sixteenth day of August, A. D. 1893, when she was run into, damaged and sunk by the said steamship Berkshire, and the circumstances of said collision are as follows: —

Fifth. The weather at the time of said collision was fair and clear, the wind light and from about the northeast, and the tide more than half ebb. The steam towboat N. & W. 1, with the barge N. &. W. 4 in tow, on a harbor length of tow line, was coming at a slow rate of speed up the channel against wind and tide, on the easterly side of the channel, bound for said port of Providence; that when in the vicinity of Sabins Point Light the steamship Berkshire was seen coming down the channel at a considerable rate of speed, and being in the centre or west side thereof.

The steamship was then some distance to the northward of Sabins Point Light, and passing the steamer Bay Queen, each passing the port side of the other, having first exchanged signals of their intention to pass in that manner, to wit, each having given one short distinct blast from her whistle in accordance with rules in such case made and provided. Soon after the Berkshire had passed the Bay Queen in manner aforesaid, the tug N. &. W. 1, in accordance with law and her duty in that regard, signalled the steamship Berkshire of her intention to pass her in the same manner, by giving one blast from her whistle, and thereupon the tug ported her helm, kept to the eastward, and continued to hold her course on the right hand or east side of the channel for that purpose; that the steamship Berkshire did not answer said signal, as she was bound by law to do, and did not keep to the right and clear of the tug and her tow, as she was bound by law to do, but, on the contrary, attempted to pass the tug on her starboard side, to wit, to pass to the eastward of her; that there was ample room for the steamship to have done this and to have escaped collision both with the tug and the tow, but that she so steered as to head directly for the tug N. & W. 1, and when she was found swinging to a starboard helm, and was making and had made no signal whatever, those in charge of the navigation of the tug, perceiving that a collision was inevitable if the tug continued to hold her course that she had properly adopted, and was in law bound and entitled to hold, at the last moment, and when a collision seemed imminent, being in great peril, and for the purpose of avoiding the immediate danger of such collision, the tug changed her course by steadying her helm and stopped her engine, and the Berkshire passed within a very few feet of the tug to the eastward of her, leaving the tug on her starboard hand; that up to this time the Berkshire had neither heeded the signal of the tug nor altered her course in accordance with the signal to avoid the tug, nor done any other thing apparent to the tug to avoid the collision which the Berkshire's course seemed bound to bring about; that about the time of passing the tug she had apparently slowed down and reversed her engines, and was apparently attempting to escape collision with the barge by backing her engine, but did not do so, and she carelessly and negligently struck the barge N. &. W. 4 on the starboard side of the stem, and inflicted such a wound upon her that in a few minutes she filled and sank somewhat to the westward and below the point at which she was struck, in about four and a half fathoms of water.

After striking the barge the Berkshire backed off, and from the effect of backing her stern had swung more to her left and was further to the eastward than when she struck the barge, despite which she had sufficient room by afterwards going ahead to clear the sinking barge, pass under her stern, and return up the channel to Providence to the westward of her, which she did, showing conclusively that if, after passing the tug, Berkshire had gone ahead on her engine under a starboard helm, instead of backing (which threw her head towards and into the barge), there was space enough to have gone clear.

Sixth. That these libellants have not been able to ascertain the damage and injury to said barge N. & W. 4, but they are informed and believe that there may be a total loss of the same of the value, to wit, $39,200, and they are further informed and believe that there may be a total loss of said cargo of seventeen hundred and sixty tons of coal of the value of, to wit, $4,500, and also that the freight money earned by the carriage of the said coal from the said port of Norfolk to the port of Providence by the said barge, amounting to the sum of, to wit, $1,500, which will prove a total loss; and that in any event the expense of repairing and of salving said cargo and barge will be very large, which is the damage sustained by the libellants through the fault of said steamer Berkshire.

And these libellants are informed that there may be some small salvage on said barge and cargo, the amount of which is uncertain and undetermined, and these libellants are willing and offer to abandon all claim to said salvage upon prepayment to them of said amount of ($45,200) forty-five thousand two hundred dollars, with interest thereon.

Seventh. And these libellants allege that the loss of the said barge N. & W. 4 and her cargo was occasioned and caused solely by the neglect, inattention, careless and unskilful management of said steamship Berkshire and those in charge of her navigation, first, in disregarding the signals of the tug and, contrary to law, attempting to pass to starboard of said barge, and, second, having attempted to pass on that side, in not keeping clear of said barge, and, third, that she was proceeding at an undue and unsafe rate of speed, and did not slow down or reduce her speed and stop in time and in order to avoid the collision, which she might have done.

Eighth. That the said steamship is now lying in the port of Providence and within the jurisdiction of this Honorable Court.

Ninth. That since the occurrences aforesaid the said libellants have applied to the owners of said steamship Berkshire for the damage sustained by them, as aforesaid, but the said owners have not paid the same.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, the libellants pray that process in due form of law, according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction, may issue against the said steamship Berkshire, her boats, tackle, apparel, furniture, engines, boilers, propeller, etc.; and all persons having any interest therein may be cited to appear and answer on oath all and singular the premises, and that this Honorable Court would decree the payment of the damages, as aforesaid, and that said vessel may be condemned and sold to pay the same, and that the libellants may have such further and other relief as in law and justice they may be entitled to receive.

NORFOLK & WESTERN
RAILROAD COMPANY, [SEAL]
by F. J. KIMBALL, *President.*
SAML. CASTNER, JR. [SEAL]
HENRY B. CURRAN. [SEAL]
Trading as CASTNER & CURRAN.

Attest:
A. J. HEMPHILL,
Secretary.

Subscribed and sworn to by A. J. Hemphill, Secretary of said Norfolk & Western Railroad, and on its behalf, and by Henry B. Curran, member of the firm of Castner & Curran, of the city of Philadelphia and Commonwealth of Pennsylvania, this eighth day of September, A. D. 1893.

A. J. HEMPHILL, *Secretary.*
HENRY B. CURRAN.

Before me,
[L. S.] WM. W. CRAIG,
Commissioner of the Circuit Court of
the United States, Eastern District of Penn

LIBELLANTS' BOND FOR COSTS.

[FILED OCT. 6, 1893.]

Whereas, a libel was filed in this court on the sixth day of October, A. D. 1893, by the Norfolk & Western Railroad Company, a corporation duly created under the laws of the Commonwealth of Virginia, and located and doing business therein and elsewhere, and Samuel Castner, Jr., and Henry B. Curran, copartners doing business under the firm name and style of Castner & Curran, in the city of Philadelphia in the Commonwealth of Pennsylvania, against the steamship Berkshire, her tackle, apparel and furniture, boats, boilers, engines and propeller, etc., for the reasons and causes in said libel mentioned.

Now comes said Norfolk & Western Railroad Company, and said Samuel Castner, Jr., and Henry B. Curran, copartners as Castner & Curran, as principals, and as surety, and agree that in case of default or contumacy on their part, an execution may issue against their goods, chattels and lands for the sum of two hundred and fifty dollars ($250).

Now, therefore, it is hereby stipulated and agreed for the benefit of whom it may concern that the stipulators undersigned, and each of them, are bound in the sum of two hundred and fifty dollars ($250), conditioned that the libellants shall pay all costs and expenses which shall be awarded against them by the final decree of this Court, or upon appeal by the Appellate Court.

NORFOLK & WESTERN
Attest: RAILROAD COMPANY, [SEAL]
A. J. HEMPHILL, *by* F. J. KIMBALL, *President.*
Secretary. SAMUEL CASTNER, JR., [SEAL]
HENRY B. CURRAN, [SEAL]
trading as CASTNER & CURRAN.

Taken and acknowledged this eighth day of September, A. D. 1893. Before me,

[SEAL] WM. W. CRAIG,
Commissioner of the Circuit Court of the
United States, Eastern District of Penn.

We hereby agree to the sufficiency of this bond.

CARVER & BLODGETT,
Proctors for Claimants.

PROVIDENCE, Oct. 6, 1893.

WARRANT AND MONITION.

[ISSUED OCT. 6, 1893.]

UNITED STATES OF AMERICA,
DISTRICT OF RHODE ISLAND, SS.

[L. S.] *The President of the United States of America to the Marshal of said District, or to his Deputy*, GREETING:

Whereas, a libel hath been filed in the District Court of the United States for the District of Rhode Island, on the sixth day of October, A. D. 1893, by the Norfolk & Western Railroad Company, a corporation duly created under the laws of the Commonwealth of Virginia, and located and doing business therein and elsewhere, owners of the barge N. & W. 4, and Samuel Castner, Jr., and Henry B. Curran, copartners, doing business under the firm name and style of Castner & Curran, in the city of Philadelphia, in the Commonwealth of Pennsylvania, owners of seventeen hundred and sixty tons of coal laden aboard said barge N. & W. 4, against the steamship Berkshire, her boats, tackle, apparel, furniture, boilers, engines, propeller, and all persons lawfully intervening for their interest in the same, in a cause of collision civil and maritime, for the reasons and causes in said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said steamship Berkshire, her boats, tackle, apparel, furniture, boilers, engines and propeller, may be cited in general and special to answer the premises, and all proceedings being had, that the said steamship Berkshire, her boats, tackle, apparel, furniture, boilers, engines and propeller, may, for the causes in said libel mentioned, be condemned and sold as prayed for in said libel.

You are therefore commanded to attach said steamship Berkshire, her boats, tackle, apparel, furniture, engines, boilers and propeller, and to detain the same in your custody until further order of Court, and to give due notice to all persons claiming the same, or having anything to say why the same should not be sold pursuant to the prayer of said libel, that they appear before said court to be held at Providence, in and for said District, on the twenty-third day of October, A. D. 1893, at ten o'clock A. M., then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises, do you then and there make return thereof, together with this writ.

Witness the HON. GEORGE M. CARPENTER, Judge of said court at Providence, in said District, this seventh day of October, A. D. 1893.

WILLIAM P. CROSS, *Clerk.*

MARSHAL'S RETURN TO MONITION.

At PROVIDENCE, Oct. 7, A. D. 189 .

In obedience to the within monition, I attached the said steamship Berkshire, her boats, tackle, apparel, furniture, engines and boilers and propeller, and have given due notice to all persons claiming the same, by advertising the substance of this monition in the *Providence Journal.*

Fees $12.12.

JOHN ANDERSON,
Deputy U. S. Marshal.

CLAIM.

[FILED OCT. 6, 1893.]

And now comes the Merchants & Miners Transportation Company, a corporation duly organized under the laws of the State of Maryland, and owner of said steamer Berkshire, and by its agent, James W. McCloskey, of Providence, claim the said steamer and ask that the said steamer be delivered up to the said corporation, inasmuch as it, and it alone, is entitled to the possession of her.

MERCHANTS & MINERS
TRANSPORTATION COMPANY,
JAMES W. McCLOSKEY, *Agent.*

STATE OF RHODE ISLAND,
PROVIDENCE COUNTY, ss.

PROVIDENCE, Oct. 6, 1893.

Then personally appeared before me James W. McCloskey and made under oath that the statement by him subscribed was true, and that he was the agent of the aforesaid corporation.

In witness whereof I herewith set my hand and notarial seal this sixth day of October, 1893.

[SEAL] WILLIAM P. CROSS, *Notary Public.*

CLAIMANT'S BOND FOR COSTS.

[FILED OCT. 6, 1893.]

UNITED STATES OF AMERICA,
DISTRICT OF RHODE ISLAND.

In the matter of the Norfolk & Western Railroad Company, Samuel Castner, Jr., and Henry B. Curran, libellants, against the steamship Berkshire, her tackle, apparel and furniture.

Whereas, the Merchants & Miners Transportation Company, a corporation duly organized under the laws of the State of Maryland, has intervened as claimant in the above-named proceedings, claiming the said steamship Berkshire, her tackle, engines, apparel and furniture as its own property, —

Now, therefore, the said Merchants & Miners Transportation Company, as principal, George J. Appold, Henry James and Michael Jenkins, all of Baltimore, State of Maryland, and Ellerton P. Whitney, of Boston, State of Massachusetts, as sureties, hereby, for the benefit of said libellants and of whomsoever it may concern, stipulate and agree in the sum of two hundred and fifty dollars ($250) that the said Merchants & Miners Transportation Company shall pay all costs which may be awarded or decreed against it in said proceedings by the District Court of the United States for the District of Rhode Island, or by any appellate court before which the said proceedings may be brought. And in case of default bythe said Merchants & Miners Transportation Company, the said principal and sureties hereby stipulate and agree that execution may issue against them, separately or jointly, to an amount not exceeding said two hundred and fifty dollars ($250).

Witness the seals of the parties aforesaid hereto set this sixth day of October, Anno Domini eighteen hundred and ninety-three.

MERCHANTS & MINERS
TRANSPORTATION CO., [SEAL]
GEORGE J. APPOLD, *President.*
GEORGE J. APPOLD. [SEAL]
HENRY JAMES. [SEAL]
MICHL. JENKINS. [SEAL]
ELLERTON P. WHITNEY. [SEAL]

In the presence of EDWARD E. BLODGETT, to all five.

Assented to: W. G. ROELKER, *Proctor for Libellant.*

AGREEMENT TO DELIVER AND FOR VALUE.

[FILED OCT. 6, 1893.]

In the above-entitled cause it is hereby stipulated and agreed that the value of said steamer Berkshire, her boats, tackle, apparel and furniture, engines, boilers, etc., is of the value of fifty thousand dollars, and that the said steamer may be delivered to the claimant, the Merchants & Miners Transportation Company, upon filing a bond in that amount with the said Merchants & Miners Transportation Company, as principal, and George J. Appold, Henry James and Michael Jenkins, all of Baltimore, in the State of Maryland, and Ellerton P. Whitney, of Boston, in the Commonwealth of Massachusetts, as sureties.

W. G. ROELKER,
Proctor for Libellant.
CARVER & BLODGETT,
Proctor for Claimant.

CLAIMANT'S BOND ON DELIVERY.

[FILED OCT. 6, 1893.]

Whereas, the Norfolk & Western Railroad Company, Samuel Castner, Jr., and Henry B. Curran have presented their libel against the steamship Berkshire, its tackle, apparel and furniture, in the district Court of the United States for the District of Rhode Island, and process of arrest against the said steamship Berkshire has issued and has been served, and the same, with her engines, tackle, apparel and furniture, has been claimed by the Merchants & Miners Transportation Company, a corporation duly organized under the laws of the State of Maryland, and it has been stipulated and agreed between the said libellants and the said claimant that the said steamship Berkshire, its tackle, apparel and furniture, may be surrendered to the said claimant or claimants filing a proper stipulation in the sum of fifty thousand dollars.

Now, therefore, the said claimant, the Merchants & Miners Transportation Company, as principal, and George J. Appold, Henry James and Michael Jenkins, all of Baltimore, State of Maryland, and Ellerton P. Whitney, of Boston, State of Massachusetts, as sureties, stipulate and agree that at any time, upon the interlocutory order or decree of the said District Court, or of any appellate court to which the said libel proceedings maybe carried, and on notice of such order to the proctor of the said claimant, the said Merchants & Miners Transportation Company shall, for the benefit of the said libellants or of whomsoever it may concern, bring into court the said sum of fifty thousand dollars, or such part thereof as may be so ordered or decreed. And in default thereof the said principal and the said sureties hereby stipulate and agree that process of execution may issue against them, severally or jointly, up to the said fifty thousand dollars ($50,000).

Witness the seals of the parties aforesaid hereto set this sixth day of October, Anno Domini eighteen hundred and ninety-three.

MERCHANTS & MINERS
TRANSPORTATION CO., [SEAL]
GEORGE APPOLD, *President.*
GEORGE J. APPOLD. [SEAL]
HENRY JAMES. [SEAL]
MICHL. JENKINS. [SEAL]
ELLERTON P. WHITNEY. [SEAL]

In presence of Edward E. Blodgett, to all five.

Assented to: W. G. ROELKER, *Proctor for Libellant.*

WARRANT OF DELIVERY.

[ISSUED OCT. 7, 1893.]

THE PRESIDENT OF THE UNITED STATES,

[L. S.] *To the Marshal of the United States for the District of Rhode Island, or to his deputy,* GREETING:

Whereas the steamship Berkshire, her tackle, apparel, furniture, boilers, engines and propeller, claims by James W. McCloskey, as agent for the Merchants & Miners Transportation Company, has been agreed to be delivered up to the claimant aforesaid upon the filing in the office of the clerk of the District Court for said district of a stipulation in the sum of fifty thousand dollars, conditioned to abide by and pay the money awarded by the final decree of said court, or, upon appeal, by the appellate court, and whereas said stipulation has been filed accordingly.

You are therefore to deliver up the said steamship, her tackle, apparel, furniture, boilers, engines and propeller, to the said claimant, taking his receipt therefor on this warrant, and to make return of this warrant, with your doings thereon, into the office of said clerk

Witnesss, the Honorable GEORGE M. CARPENTER, our District Judge, at Providence, this seventh day of October, 1893.

[L. S.] WILLIAM P. CROSS, *Clerk.*

RECEIPT FOR VESSEL.

At Providence, this seventh day of October, A. D. 1893, I have received from John E. Kendrick, Esq., Marshal of the United States, the steamship Berkshire, her tackle, apparel, furniture, boilers, engines and propeller, in like good order and condition as when the same was attached by him.

MERCHANTS & MINERS
TRANSPORTATION CO.,
JAMES W. MCCLOSKEY, *Agt.*

MARSHAL'S RETURN TO WARRANT OF DELIVERY.

PROVIDENCE, Oct. 7, 1893.

I have this day served this warrant, and have delivered the steamship Berkshire, her tackle, apparel, furniture, boilers, engines and propeller, to James W. McCloskey, agent Merchants & Miners Transportation Company, and have here the receipt therefor.

JOHN ANDERSON,
Deputy United States Marshal.

CLAIMANT'S ANSWER.

[FILED OCT. 31, 1893.]

To the Honorable GEORGE M. CARPENTER, *Judge of the District Court of the United States, within and for the District of Rhode Island:*

The answer of the Merchants & Miners Transportation Company, a corporation duly organized under the laws of the State of Maryland, to the libel and complaint of the Norfolk & Western Railroad Company, Samuel Castner and Henry B. Curran against the steamship

Berkshire. And thereupon your respondents answer and allege as follows: —

First. That as to the matters and things continued in the first, second and third articles of said Libel, your respondent is ignorant as to their truth, and so can neither admit nor deny the same, but leaves the libellants to their proof if material.

Second. That as to the matters contained in the fourth article of said libel, your respondent admits that the said barge was being towed by the tug therein stated, and admits that she was sunk on the sixteenth day of August, but denies that the said sinking and said collision with the steamship Berkshire were caused by the negligence of the said steamship or those in charge of her.

Third. That as to the matter contained in the fifth article of said libel, your respondent admits that the weather was clear and fair, the wind light from the north and east, and that the tide was about half ebb, but denies that the said tugboat N. & W. 1, with the barge N. & W. 4. in tow, were proceeding at a slow rate of speed, and denies that the said steamship Berkshire was coming down the channel at a high rate of speed; admits that the said steamship passed the steamer Bay Queen and that both steamers passed on the port side of the other, having first exchanged signals by whistles of their intention so to do; denies that the said tugboat N. & W. 1 signalled the steamship Berkshire of her intention to pass, as alleged, by giving one blast from her whistle, and as to the other matters in said article contained, your respondent denies the same as fully and entirely as though each part thereof was specifically pleaded, except as the same may be hereinafter admitted.

Fourth. That as to the matter contained in the sixth article of said libel, your respondent denies that the loss to said barge and her cargo amounts to thirty-nine thousand two hundred dollars ($39,200), and denies that there was a total loss of said barge, her cargo or freight money; that as to all other matters in said article contained, your respondent is ignorant, and therefore can neither admit nor deny the same, but leaves the libellant to its proof, if material.

Fifth. That as to the matters contained in the seventh article of said libel, your respondent denies the truth of the same.

Sixth. That as to the matter contained in the eighth article of said libel, your respondent admits the truth of the same.

Seventh. That as to the matter contained in the ninth article of said libel, your respondent admits the jurisdiction of this Honorable Court, but as to the other allegations in said article contained, your respondent denies the same.

Eighth. And your respondent, further answering, says that the true facts relating to said collision are as follows: —

That the steamship Berkshire is an iron, screw steamship of 2,014 tons register; that she is two hundred and fifty feet long and thirty-nine feet wide; that on Aug. 16 last, at about 2.30 P. M., the said steamship Berkshire left the wharf at Providence, R. I., with a cargo of general merchandise bound to Norfolk, Va.; that the weather was clear, the wind light and the tide on the ebb; that the said steamship was at that time staunch, strong, seaworthy, and well manned and equipped.

As the said steamship was proceeding down Providence River at a point about five (5) miles south from her wharf, being then in inland waters, a towboat with a barge in tow was discovered on the starboard side of the channel, and on the starboard bow of the said Berkshire. Upon watching the said tugboat, it was seen that she, with her tow (to which she was connected with a hawser from six hundred to seven hundred feet in length), was coming up the channel, but heading across towards the western side, that is, crossing the bow of said steamship from port to starboard. No signals were exchanged with said tug or her tow, but they still proceeded across the channel in the direction she was proceeding.

The master of the said steamship Berkshire, seeing that he must go towards the eastern side of the channel in order to clear said tug and tow, put his helm to starboard, and soon thereafter reversed his engines and put them full speed astern, as the said tow then seemed to change the direction in which it was going. Notwithstanding those on board the Berkshire did all that was possible, the said steamship and the said barge came into collision, causing the said barge to fill and sink, and causing damage to the said steamship Berkshire.

Ninth. That at the time of the collision, the said steamship was still in the water, possiby moving a little with the tide; that the said tug and tow were proceeding at the rate of about six (6) miles per hour. If the said tugboat had been alongside of the said barge, or if said barge had proceeded directly astern of the tugboat in the same direction, or if the said barge had put her helm to starboard, no collision would have taken place.

Tenth. That the said collision and the damage resulting therefrom was caused wholly by the negligence of the said tugboat N. & W. No. 1, and the barge N. &. W. No. 4, both owned by the said libellant, the Norfolk & Western Railroad Company, among other reasons,—

1. In proceeding up a narrow channel with such a long tow line.
2. In proceeding across a narrow channel in such a way as to block the channel, when they should have kept right up the channel.
3. In the barge not proceeding directly after the tugboat.
4. In the barge not putting her helm to starboard.
5. In not keeping clear of the said steamship Berkshire as required by law, and other faults to be shown at the trial of said cause.

Eleventh. That the said steamship Berkshire and those in charge of her were wholly without fault, and did all that could be done to avoid a collision.

Twelfth. And your respondent further answering, and without waiving any of the allegations and defences heretofore set up, but relying wholly upon the same, says that the said steamship Berkshire was a ship engaged in the transportation of merchandise and property between the ports of the United States of America, to wit, between the ports of Providence, R. I., and Norfolk, Va., and was engaged in the transportation of merchandise on the said sixteenth day of August, 1893.

That the said Berkshire was in all respects seaworthy, properly manned, equipped and supplied, and that by and under Section 3 of the statute of the United States entitled "An Act relating to the Navigation of Vessels", etc., approved Feb. 13, 1893, and to go into effect the first day of June, 1893, the said steamship Berkshire is not responsible for the collision heretofore described, even if it resulted from faults or errors in the navigation or in the management of said steamship, inasmuch as the said collision occurred after said statute went into effect.

Thirteenth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, your respondent prays that the aforesaid libel may be dismissed, with costs.

MERCHANTS & MINERS
TRANSPORTATION CO.,
by ELLERTON P. WHITNEY, *Director.*

CARVER & BLODGETT, *Proctors.*

COMMONWEALTH OF MASSACHUSETTS,
SUFFOLK, SS. BOSTON, Oct. 28, 1893.

Personally appeared before me Ellerton P. Whitney and subscribed to the foregoing answer, and made oath that the same was true, to the best of his knowledge and belief.

In witness whereof I hereunto set my hand and notarial seal the day and year first above written.

[L. S.] EUGENE P. CARVER, *Notary Public.*

LIBELLANTS' EXCEPTION TO CLAIMANT'S ANSWER.

[FILED DEC. 22, 1893.]

To the Honorable GEORGE M. CARPENTER, *Judge of the United States District Court within and for the State of Rhode Island:*

And now comes the Norfolk & Western Railroad Company, owners of the barge 4 N. & W., and Samuel Castner, Jr., and Henry B. Curran, and file the following exception to the answer of the Merchants & Miners Transportation Company in the above-entitled cause; and thereupon said libellant excepts to the said answer for the following cause: That in said answer said claimant has set forth, to exempt it from liability for the damages arising from the collision in said libel mentioned, Section 3 of the statute of the United States entitled, "An Act relating to the Navigation of Vessels", etc., approved Feb. 13, 1893, which act, for all purposes in this case, is irrelevant, immaterial, and improperly pleaded herein.

Wherefore, your libellants pray that the said claimant be directed to strike out of said answer all reference to said statute, and for such other and further relief as the Court is competent to give in the premises.

By their Proctor,

W. G. ROELKER.

This action came on to be heard on libellants' exceptions to claimant's answer on Dec. 26, 1893, before Hon. George M. Carpenter, District Judge, who directed the entry of the following order:

Ordered, that libellants' exceptions to claimant's answer be sustained.

This cause came on for final hearing, and was fully heard and argued by the proctors for the several parties hereto before the Hon. George M. Carpenter, Judge, who, after consideration thereof, on, to wit, the fifteenth day of November, 1895, directed the entry of the following final decree: —

FINAL DECREE.

This cause having been heard by the Court, and an interlocutory decree having been ordered in favor of the libellants in this action, —

Now, therefore, it is hereby ordered, adjudged and decreed that said libellants recover against the claimant, owner of the steamship Berkshire, the sum of thirty-four thousand four hundred fifty-seven and thirty one hundredths dollars damages, made up according to schedule hereto annexed, marked "Schedule A," and the sum of forty-nine and seventy-two one hundredths dollars costs, as taxed by the clerk.

And it is further ordered, adjudged and decreed that unless this decree be satisfied, or proceedings thereon be stayed by appeal or otherwise, within the time and in the manner prescribed by the rules and practice of this court, the stipulators for costs and to the action on the part of the claimant shall cause the engagements of their stipulations to be performed, or show cause why execution should not issue against their goods, chattels and credits to the amounts of those stipulations, to enforce satisfaction of this decree.

Entered as the decree of this Court, by order thereof, this fifteenth day of November, 1895.

W. P. CROSS, *Clerk.*

SCHEDULE A.

For raising said barge	$9,273 00
For dry dock repairs	13,500 00
For wages and sundry expenses connected therewith	1,223 09
For storing anchors of said barge	51 50
For sail covers	80 00
For furnishings for said barge	625 59
For blocks for said barge	8 48
For surveyors Ryder	75 00
Biard	95 00
Murphy	42 00
For caulking cabin floor	24 50
For carting new hawser	1 50
For windlass cover	15 00
For demurrage on said barge	2,729 00
Loss on freight	37 50
For loss on cargo, invoice price	3,205 62
	30,986 78
Interest from Jan. 1, 1894, to Nov. 12, 1895, at six per cent per annum	3,470 52
Total	$34,457 30

A true record:

Attest: WILLIAM P. CROSS, *Clerk.*

ASSIGNMENT OF ERRORS AND PRAYER FOR APPEAL.

[FILED NOV. 19, 1895.]

The claimant, being aggrieved by the decree, rulings and findings of the United States District Court for the District of Rhode Island, hereby appeals from said decree, rulings and findings therein contained, and makes the following Assignment of Errors:

First. That the Court should have found that the collision occurred through no fault on the part of the steamship Berkshire and those in charge of her at the time of the collision.

Second. That the Court erred in holding that the said steamtug and the barge in tow, both owned by the libellants, were without fault, and that no action on their part in any way contributed to the collision.

Third. That the Court should have found that the collision and the damage resulting therefrom were caused wholly through the negligence of the steamtug N. & W. 1, and the barge N. & W. 4, owned by the libellants, the said Norfolk & Western Railroad Company, in proceeding up such a narrow channel with such a long tow between them.

Fourth. That the Court should have found that the collision and the damage resulting therefrom was caused wholly through the negligence of the said tug and tow in proceeding across a narrow channel in such a way as to block the channel of the river.

Fifth. That the Court should have found that the barge N. & W. No. 4 was wholly in fault in not proceeding right behind the tug that was towing her.

Sixth. That the Court should have found that the barge N. & W. No. 4 was at fault in not putting her helm to starboard before she did.

Seventh. That whereas the decree is for the libellants, said decree should have been for the respondent for full damages.

And for the failure of the Court to find in the manner prescribed, and for other reasons, the claimant prays that the decision of the District Court for the District of Rhode Island may be reversed, and that a decree may be given for the said claimant dismissing the libel against the said steamship Berkshire; and thereupon the claimant appeals from said decision and findings of the said District Court, according to law, to the Circuit Court of Appeals, and prays that this, its appeal, may be allowed.

MERCHANTS & MINERS
TRANSPORTATION CO.,
by CARVER & BLODGETT, *its Attorneys and Proctors.*

BOND TO PARTY ON APPEAL.

[FILED NOV. 19, 1895.]

Know all men by these presents, that we, the Merchants & Miners Transportation Company, a corporation duly organized and existing under the laws of the State of Maryland, and having a usual place of business in the District of Rhode Island, as principal, and Ellerton P. Whitney, of Milton, in the District of Massachusetts, and James W. McCloskey, of Providence, in the District of Rhode Island, as sureties, are held and firmly bound unto the Norfolk & Western Railroad Company, in the full and just sum of two hundred and fifty dollars to be paid to the said Norfolk & Western Railroad Company, certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this eleventh day of November in the year of our Lord one thousand eight hundred and ninety-five.

Whereas, lately at a District Court of the United States for the District of Rhode Island, in a suit in admiralty depending in said court between the Norfolk & Western Railroad Company *et al.* and the steamship Berkshire, a decree was entered against the said Merchants & Miners Transportation Company, claimants for said steamship Berkshire, and the said Merchants & Miners Transportation Company having obtained an appeal to remove said cause to the United States Circuit Court of Appeals for the First Circuit, to reverse the decree in the aforesaid suit, and a citation directed to the said Norfolk & Western Railroad Company, citing and admonishing it to be and appear in the said United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the

Now, the condition of the above obligation is such, that, if the said Merchants & Miners Transportation Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its appeal good, then the above obligation to be void; else to remain in full force and virtue.

MERCHANTS & MINERS
TRANSPORTATION CO., [SEAL]
by ELLERTON P. WHITNEY, *Director.*
ELLERTON P. WHITNEY. [SEAL]
J. W. McCLOSKEY. [SEAL]

Approved Nov. 19, 1895: G. M. CARPENTER, J.

ORDER OF APPEAL.

[ENTERED NOV. 19, 1895.]

And now, upon the application of the claimant for an appeal from the decree in this action, and upon the filing of assignments of error and bond, it is ordered that said appeal be allowed, and that the record in this case be transmitted to the Circuit Court of Appeals for the First Circuit.

Entered as the order of this Court the nineteenth day of November, 1895.

WILLIAM P. CROSS, *Clerk.*

STIPULATION AS TO TESTIMONY.

[Filed Dec. 7, 1895.]

In the above-entitled case it is hereby agreed that the clerk may omit all testimony from the appeal record. The original exhibits on file in the District Court to be sent up to the Court of Appeals.

W. G. ROELKER, *Proctor for Libellants.*
CARVER & BLODGETT, *Proctor for Claimants.*

CITATION ON APPEAL.

The President of the United States,
To the Norfolk & Western Railroad Company and others, Greeting:

You are hereby cited and admonished to be and appear in the United States Courtof Appeals for the First Circuit, in the city of Boston, Massachusetts, on the thirtieth day of November next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Rhode Island, wherein the Merchants & Miners Transportation Company is appellant, and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George M. Carpenter, Judge of the District Court of the United States for the District of Rhode Island, this nineteenth day of November, in the year of our Lord one thousand eight hundred and ninety-five.

G. M. CARPENTER, *Judge.*

Service is hereby acknowledged of within citation this day.

Norfolk & Western Railroad Co.,
Castner & Curran,
by W. G. Roelker, *Proctor.*

Providence, Nov. 25, 1895.

CLERK'S CERTIFICATE.

United States of America,
District of Rhode Island, ss.

I, William P. Cross, Clerk of the District Court of the United States for the District of Rhode Island within the First Circuit, certify that the foregoing is a true copy of the record and all proceedings in the cause in admiralty entitled,

No. 1021,

Norfolk & Western Railroad Co. *et al.*
v.
Steamship Berkshire, etc.,

in said District Court determined, the petition for appeal, the assignment of errors, the bond to party on appeal and the order allowing said appeal, and also the original citation issued upon the appeal of the claimant in said cause, with the acknowledgment of service thereof thereon (except that the testimony is omitted in accordance with a stipulation, a copy of which is included in this transcript of record).

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Providence, in said District, this eleventh day of December, A. D. 1895.

[SEAL] WILLIAM P. CROSS, *Clerk.*

AGREEMENT AS TO PROOFS.

[FILED IN CIRCUIT COURT OF APPEALS, DEC. 18, 1895.]

It is hereby agreed that the above-entitled cases may be tried upon the following proofs, being all the proofs used in the District Court. Any other proofs which may be taken by either party in accordance with the rules and practice of this court to be also admissible.

CARVER & BLODGETT,
Proctors for Appellants.
W. G. ROELKER,
Proctor for Appellees.

PROOFS IN DISTRICT COURT.

APPEARANCES IN DISTRICT COURT AND AT TAKING OF DEPOSITIONS.

EUGENE P. CARVER, ARNOLD GREEN, GEORGE A. LITTLEFIELD, *for* MERCHANTS & MINERS TRANSPORTATION COMPANY, *Libellant in No.* 1019, *and Claimant in No.* 1021 (*now Appellant in both cases in the Circuit Court of Appeals, Nos.* 160 *and* 161).

WILLIAM G. ROELKER, *for* NORFOLK & WESTERN RAILROAD COMPANY, *Claimant in No.* 1019 (*now Appellee in No.* 160 *in the Circuit Court of Appeals*), *and for* NORFOLK & WESTERN RAILROAD COMPANY ET AL., *Libellants in No.* 1021 (*now Appellees in No.* 161 *in the Circuit Court of Appeals*).

PROOFS FOR MERCHANTS & MINERS TRANSPORTATION COMPANY, NOW APPELLANT.

DEPOSITION OF JAMES W. PRATT.

Direct Examination by MR. CARVER.

PROVIDENCE, March 8, 1894.

Q. 1. What is your full name? *A.* James W. Pratt.

Q. 2. How old are you, and where do you live? *A.* Forty-five years of age. Live in Providence, Fremont Street.

Q. 3. What is your occupation? *A*. Engineer.

Q. 4. And you were chief engineer on the Berkshire at the time of her collision with the barge — what is her name? *A*. No. 4. She had no name.

Q. 5. At the time of the collision with the barge in August, 1893? *A*. Yes, sir.

Q. 6. How long have you been an engineer? *A*. About twenty years.

Q. 7. How long have you been on the Berkshire? *A*. Four years; five years come July.

Q. 8. How long have you been chief engineer of steamships? *A*. Twelve years; a little over; between twelve and thirteen.

Q. 9. What is the character of the engines of the Berkshire? *A*. Compound; tandem.

Q. 10. What is the number of revolutions they make when you are going full speed ahead? *A*. They average sixty-five to sixty-eight turns, running light.

Q. 11. In case they are running full speed astern, what is the effect? *A*. We turn her up then as fast as possible, and she will make seventy-five to eighty turns a minute.

Q. 12. What is her maximum speed? *A*. Eleven and a half knots, under ordinary circumstances.

Q. 13. Have you ever made any experiments with the Berkshire as to how quick she will stop if she is going full speed ahead, and go astern? *A*. We have stopped in one minute twenty-eight seconds.

Q. 14. At what rate were you running? *A*. We were running then at the rate of twelve knots.

Q. 15. Were you on board the Berkshire at the time of this collision? *A*. I was, sir.

Q. 16. Do you know what time the Berkshire left Providence that day? *A*. By the engine room time 2.40. There is a discrepancy in the time. They take the time on the wharf as soon as the lines are cast off, and we never take the time until the ship speeds, just below the end of the New York wharf.

Q. 17. Do you know what time the collision took place? *A*. I have got the abstract of the log; that shows it.

[*Hands him abstract.*]

Q. 18. Where is the log book? *A*. It is aboard the ship. There is an abstract directly from it.

Q. 19. We don't want that. We want the log itself. *A*. We can telephone down for the log.

Q. 20. Yes; telephone down to bring up the engineer's log. I simply wanted to fix the time of the collision. I don't suppose there will be much dispute about the time. [*Log book telephoned for.*]

Q. 21. I will go on with the examination; leave that point. Was you in the engine room from the time that she left the wharf until the collision took place? *A*. I was not.

Q. 22. Where was you after she left the wharf? *A*. On deck.

Q. 23. On what part of the ship? *A*. Just abaft amidships, at the aft main deck hatch, between the saloon and the engine room.

Q. 24. Could you see all over the ship at that place? *A*. Oh, no, sir.

Q. 25. What could you see by looking out over the sides? *A*. I could see down the channel.

Mr. Roelker. You were between the saloon and the engine room? *A*. Yes, sir.

Q. 26. And you could see between the two houses? *A*. Yes; there is an opening between the two houses, between the saloon house and the engine room deck house.

Q. 27. What were you doing a few minutes before the collision? *A*. Walking back and forward on the deck.

Q. 28. On which side? *A*. From one side to the other.

Q. 29. Across the deck? *A*. Yes.

Q. 30. Did you pass or see any vessels, before the collision, going down? *A*. Yes, sir; we passed a little river steamer, the Petrel, if I remember rightly,— she was bound down; and another little boat, I forget her name, bound apparently towards Bullock's Point.

Q. 31. Did you see the Bay Queen? *A*. Yes, sir.

Q. 32. Did you pass her? *A*. She was going up.

Q. 33. About how fast do you think you were going at the time you passed the Bay Queen? *A*. I should think between eight and nine miles an hour.

Q. 34. How long after you passed the Bay Queen was it when the collision took place? *A.* I could hardly say; I don't know the time we passed the Bay Queen.

Q. 35. When you first saw the Bay Queen, how did she bear? *A.* I should say about a point and a half forward of the port beam.

Q. 36. Was there any signals passed between you and the Bay Queen? *A.* Our ship blew one whistle and she answered.

Q. 37. Was it answered by the Bay Queen? *A.* Yes, sir.

Q. 38. And they passed on which side of you? *A.* We passed on her port side; she passed on ours. Port side to port side.

Q. 39. Both ships went to starboard? *A.* Yes, sir.

Q. 40. Did you see anything of a towboat with a barge in tow? *A.* Yes, sir.

Q. 41. How far off do you think they were when you first saw them? *A.* I could not say, sir. I did not pay any attention. Did not apprehend any trouble at all.

Q. 42. You saw the towboat and barge just below Sabin's Point, apparently coming round Sabin's Point? *A.* Yes; they showed out just about the Point.

Q. 43. Was the towboat alongside of the barge? *A.* No, sir; she was ahead of her.

Q. 44. Attached by a hawser? *A.* Yes, sir.

Q. 45. How long should you say the tow line was? *A.* I should say she had a full ninety-fathom line out. It looked to me like a very long tow line, unusually long to tow in the river.

Q. 46. Did you hear any whistles pass between your vessel and the tugboat that had the barge in tow? *A.* I did not; no, sir.

Q. 47. Did you hear any whistle from your vessel? *A.* No, sir.

Q. 48. Did you hear any from the tug? *A.* None, sir.

Q. 49. Would you have heard them if they had been blown? [*Objected to by Mr. Roelker.*] *A.* I think I could, sir.

Q. 50. On which side of your vessel was you when you saw the tug and tow? *A.* On the port side, when I saw the tug and tow.

Q. 51. Will you tell us what took place after that? That is, what you saw or did? *A.* Well, I didn't see anything until we had passed the Bay Queen. I walked over to the starboard side and then walked back again, and as I looked out I saw the towboat apparently crossing our bow. It looked to me then that a collision was inevitable. I ran then to the engine room, and as I got there the bell struck.

Q. 52. She was apparently crossing your bow? *A.* Yes, sir; the towboat and barge.

Q. 53. You say you ran to the engine room? *A.* I thought then the collision was inevitable, and ran to the engine room; before I got to the steps, I heard the bell struck to reverse the engine.

Q. 54. How many bells? *A.* The bells we hear are simply to call your attention to the indicator which they call the telegraph; there is one in the pilot house and one in the engine room. The point is carried round from slow to stop, full speed ahead, full speed astern.

Q. 55. What did the indicator show? *A.* When I looked at the indicator, I saw she was backing.

Q. 56. How long was it from the time you heard the bells which indicated she was going full speed astern until the collision took place? *A.* I should think it was a minute — a full minute.

Q. 57. And you was in the engine room? *A.* On the steps. Our steps go from the main deck to the bottom, or within a few feet of it.

Q. 58. Did you feel the shock of the collision? *A.* Yes, sir.

Q. 59. Was it a hard shock? *A.* No, sir.

Q. 60. Did it throw you down? *A.* No, sir.

Q. 61. Who was in the engine room? *A.* E. E. Calder, the first assistant.

Q. 62. Was there any one else there? *A.* No, sir.

Q. 63. Did you notice anything about the speed of the tug and the tow as they were coming up? *A.* No, sir; I did not.

Q. 64. Did you watch them at all? *A.* No, sir.

Q. 65. Do you know who was in the pilot house? *A.* The captain told me —

Mr. ROELKER. Never mind what the captain told you.

Mr. CARVER. Tell me, if you know of your own knowledge.

A. No; I do not know. I was on the main deck.

Q. 66. Was there any one forward of where you were? *A.* I suppose there must have been. I could not see them.

Q. 67. They would be hid by the houses? *A.* Yes sir.

Q. 68. Where did this collision take place? *A.* Off Sabin's Point.

Q. 69. Do you know what time it was when it occurred? About what time? *A.* It was a few minues past three. I think about 3.07; somewhere along there. I could not tell exactly now without referring to the log book. That log book is taken from the slate in the engine room.

Q. 70. With regard to that log book, did you make it? *A.* Did I write the log book?

Q. 71. Is the engineer's log book written by you? *A.* Yes, sir; it is written by me.

Q. 72. You take it from what? *A.* From the slate in the engine room. That gives the times —

Q. 73. The times when anything occurs? *A.* Yes, sir.

Q. 74. How was your steamer that night, deep loaded or light? *A.* No, sir; she was not very deep. I do not remember what her draft was, though that is also given in the log book.

Q. 75. Do you know anything about the tide? *A.* Nothing more than that it was ebb tide; flowing out.

Q. 76. The tide was with you? *A.* Yes; the tide was with us.

Q. 77. How many times have you been up and down this river? *A.* I could not say; I have been running here steadily, with the exception of when we were hauled off on the Savannah route, since 1873.

Q. 78. And do you know how strong the tide was running that night, from your experience? *A.* No, sir; I never measured the tide.

Q. 79. Was it running fast or otherwise? *A.* Not unusually fast.

Q. 80. You never paid any attention to it? *A.* Never had any call to.

Q. 81. If there had been any whistles from the tug would you have heard them? *A.* I don't see how I could have avoided hearing them, sir. There was not much wind; it was a clear afternoon; nothing to prevent us hearing the whistle.

Q. 82. You didn't know, except by what you saw afterwards, what it was that your vessel collided with, whether it was the tug or the barge? I mean at the time. *A.* I only knew from what I seen before. I knew that there would be a collision with the tug and the barge, but which she did strike I could not tell.

Q. 83. That is what I meant. *A.* No, sir; I could not tell which one.

Cross Examination by Mr. Roelker.

×-*Q.* 84. Mr. Pratt, how long have you worked for this line? *A.* Since the winter of 1867–68.

×-*Q.* 85. Steady? *A.* Well, there was a time the ship was hauled up, and I was running here on the Newport at Providence for a few months.

×-*Q.* 86. With the exception of a few months, since the winter of 1867–68 you have worked for the owners of the Berkshire? *A.* Yes, sir.

×-*Q.* 87. You are still working for them? *A.* Yes, sir.

×-*Q.* 88. How long have you been chief engineer? *A.* Twelve or thirteen years.

×-*Q.* 89. You say this Berkshire was running at full speed when you went down into the engine room? *A.* Yes, sir; she was running at full speed.

×-*Q.* 90. Now, you were not down below, you were walking up and down the deck? *A.* Across the deck; yes, sir.

×-*Q.* 91. Anybody with you? *A.* I believe the steward was on deck, and one of the waiters; I paid no attention.

×-*Q.* 92. What were you doing? Walking for exercise? *A.* No, sir; I hardly ever leave the deck until we get down past the turns.

×-*Q.* 93. Is that part of your duty? *A.* No, sir; but if a bell wire should break, or the signal went wrong, I could attend to it.

×-*Q.* 94. And you were on deck so that in case a bell wire should break or a signal go wrong you would be there to fix it or attend to it? *A.* I don't know that I had any particular idea that anything would break.

×-*Q.* 95. Were you looking out for collisions? *A.* I had no particular thought of a collision, or anything of that kind.

×-*Q*. 96. You say you have tried to stop this vessel at full speed? *A*. Yes, sir.

×-*Q*. 97. When? *A*. That very trip, going out.

×-*Q*. 98. After the accident? *A*. Yes, sir; the 16th or 18th.

×-*Q*. 99. You never tried that before? *A*. Not on that ship; but I did on the McClellan and also on the Hopkins.

×-*Q*. 100. At whose suggestion was it you tried this experiment? *A*. Captain Hooper's.

×-*Q*. 101. Was this done in connection with this accident? Did he say that this experiment had anything to do with the accident? *A*. I may have broached the question first myself.

×-*Q*. 102. Why was this trial made? *A*. Just simply to see how quickly I could stop her.

×-*Q*. 103. Why? *A*. Simply because I wanted to know.

×-*Q*. 104. Why did you want to know? *A*. Because I wanted to know.

×-*Q*. 105. But you had a reason for it? You are a very intelligent man, Mr. Pratt. You know you must have had some reason. You are here and sworn to tell the truth. *A*. That is the truth.

×-*Q*. 106. What was your reason? *A*. Just to see how long it would take.

×-*Q*. 107. It was something in your mind in connection with this accident? *A*. No, sir.

×-*Q*. 108. If this accident had not occurred would you have thought of that thing? *A*. I had thought of that many times, since we had a collision with the McClellan.

×-*Q*. 109. It was only in connection with collisions that you thought of seeing how quickly you could stop? *A*. It was at that time.

×-*Q*. 110. What was that connection you had in your mind? Be frank. *A*. Nothing more than to find out just exactly how long it would take to stop her when we were going at full speed.

×-*Q*. 111. And you did stop her in how long? *A*. A minute and twenty-eight seconds.

×-*Q*. 112. You say that the first you noticed of this tug and tow was just before you passed the Bay Queen? *A*. Yes, sir.

×-*Q*. 113. Where were you? *A*. Leaning over the port rail.

×-*Q*. 114. Where was the ship? *A*. We had passed Pomham Light.

×-*Q*. 115. You had passed it and were a little to the southward of Pomham Light? *A*. Yes; and a little to the westward.

×-*Q*. 116. You would naturally pass it to the westward. You were a little to the southward? *A*. I think it bore perhaps northeast from us.

×-*Q*. 117. And whereabouts in the stream were you? *A*. We were in the channel.

×-*Q*. 118. At which side of it? *A*. Pretty near the centre of the channel.

×-*Q*. 119. Do you know where the channel runs? *A*. Only by looking at the buoys. That is all.

×-*Q*. 120. The Bay Queen passed on your port? *A*. Yes, sir.

×-*Q*. 121. And you were looking over the port side, and you saw this tug and tow just coming round Sabin's Point? *A*. Just apparently coming out by it.

×-*Q*. 122. On your port bow? *A*. I saw them from the starboard side.

×-*Q*. 123. They were on your port bow? *A*. Yes, sir.

×-*Q*. 124. You say the tug was ahead of the barge and she towed her up the river? *A*. Yes, sir.

×-*Q*. 125. And you think that was a sixty-fathom line? *A*. It looked like an unusually long line.

×-*Q*. 126. Did that occur to you then, or not till afterwards? *A*. It simply occurred to me; I didn't remark about it to any one.

×-*Q*. 127. How close to the lighthouse were the tug and tow? *A*. To Sabin's Point?

×-*Q*. 128. Yes. *A*. Could not tell.

×-*Q*. 129. Were they pretty near to it? *A*. They had to go pretty near. I don't think the channel is more than three hundred or four hundred feet wide.

×-*Q*. 130. As near as you can judge how near were they? *A*. I would not like to commit myself.

×-*Q*. 131. They seemed coming round the Point pretty close? *A*. It seemed as though they were in the centre of the channel.

×-*Q*. 132. Now, I understood you to say that after the Bay

Queen passed, and after you saw the tug, you started and walked back to the starboard side? *A*. Yes, sir.

×-*Q*. 133. And when you walked back you thought that the tug was athwart your bows? *A*. I had walked back and forwards two or three times.

×-*Q*. 134. How long after you first saw the tug and the tow was it when you saw that the collision was inevitable? *A*. I don't know; I didn't notice the time.

×-*Q*. 135. You cannot give us any estimate at all? *A*. Could not be certain enough to do it.

×-*Q*. 136. What was the wind? *A*. Light, easterly.

×-*Q*. 137. How was the tide? *A*. Ebb tide.

×-*Q*. 138. How strong was it running? *A*. About as strong as usual; it did not appear to be a strong tide.

×-*Q*. 139. It was a clear afternoon? *A*. Yes, sir.

×-*Q*. 140. And you are positive that you heard no whistle? *A*. I heard the Bay Queen and the Petrel.

×-*Q*. 141. You say that you went down into the engine room, and as you went down you heard these two bells which would draw the attention of the engineer to the indicator? *A*. Yes, sir.

×-*Q*. 142. And you looked right at this indicator? *A*. Yes, sir.

×-*Q*. 143. What did the indicator show? *A*. Full speed astern.

×-*Q*. 144. What was the condition of the engines when you got there? *A*. She was backing full speed astern.

×-*Q*. 145. How long a time was it from the time you saw that a collision was inevitable until you got to the foot of the stairs? *A*. I don't suppose it could have been over a minute and a half, if that long.

×-*Q*. 146. How soon after you got down there did the collision occur? *A*. I didn't go into the engine room.

×-*Q*. 147. Didn't you go down to see the indicator? *A*. Yes, as she was backing down.

×-*Q*. 148. How long after you heard these bells was it that the collision occurred? *A* .I suppose it was a minute, as near as I can remember.

×-*Q*. 149. And between the time you thought a collision was inevitable and you went down stairs, and the time the collision occurred, you think was about two minutes and a half? *A.* I could not say; about that time.

×-*Q.* 150. After the collision occurred what did you do? *A.* When we stopped I went forward and examined what damage was done.

×-*Q.* 151. What was the situation of the Berkshire at that time? *A.* Nearly abreast of Sabin's Point Light.

×-*Q.* 152. Pretty near it? *A.* About west of it. Could not tell how near.

×-*Q.* 153. Which way were you heading at that time? *A.* It appeared to me somewhere to the westward of the Point.

×-*Q.* 154. The Point was just east of you, and you were heading to the west of the Point? *A.* About that.

×-*Q.* 155. The ship was heading in a southwesterly direction? *A.* Somewhere about that; I don't know the course down the river.

×-*Q.* 156. And how close to the lighthouse were you? *A.* As close in as we could safely go without running the ship a shore.

×-*Q.* 157. How close is that? *A.* I don't know how close that buoy is to the light.

×-*Q.* 158. How close to the buoy were you? *A.* I suppose we were within forty or fifty feet from the buoy. I don't know about that distance being correct.

×-*Q.* 159. Of course; these are your estimates. Where was the barge at that time? *A.* When I saw her?

×-*Q.* 160. After the collision. *A.* When I saw her she was just under our port bow when I saw her.

×-*Q.* 161. Just under your port bow? *A.* Yes, sir; we had backed clear of her.

×-*Q.* 162. Which way was she heading? *A.* I don't know how she was heading.

×-*Q.* 163. Was she heading up the river? *A.* Yes.

×-*Q.* 164. And when you came out in the way you describe, and ran forward to see what the damage was, she was directly under your port bow? *A.* Yes; what we term under our port bow. We had backed clear of her. She might have been a hundred feet from us.

×-*Q*. 165. Where was the tug? *A*. She was on our starboard side.

×-*Q*. 166. Which way was she heading? *A*. Up the river.

×-*Q*. 167. How close was she? *A*. As near as I could judge she was two hundred and fifty feet away from us.

×-*Q*. 168. And was the tow line apparently cut? *A*. I could not see anything of it.

×-*Q*. 169. Didn't see anything of the tow line? *A*. No, sir.

×-*Q*. 170. What did your vessel do then? *A*. We backed and filled there until we got the vessel headed up the river.

×-*Q*. 171. Did you go round under the stern of the barge, and go up on the westerly side of it? *A*. I could not say; I went down below into the air-tight compartment after that.

×-*Q*. 172. Did you notice what happened to the tug and barge? *A*. When I came up out of the cock pit I saw that the barge had sunk.

×-*Q*. 173. She was not visible? *A*. Well, her deck wasa wash. You could see her spars above the water.

×-*Q*. 174. She was resting on the bottom? *A*. Yes, sir.

Direct Examination resumed by Mr. Carver.

Q. 175. Which side of the channel was your vessel on while you were on deck? *A*. What time do you mean?

Q. 176. Just before the collision. *A*. We were on the east side.

Q. 177. On the east side? *A*. Yes, sir.

Q. 178. When you passed the Bay Queen you was on what side of the channel? *A*. I suppose we were not far from the centre of the channel.

Q. 179. Not far from the centre? *A*. I don't think so.

Q. 180. When you passed her she went to starboard and you went to starboard? *A*. Yes, sir.

Q. 181. How wide is the channel where you passed the Bay Queen? *A*. I don't know; I have never measured it on the charts.

Q. 182. Give us your estimate. *A*. From five hundred to seven hundred; perhaps a little narrower or perhaps a little wider.

Q. 183. At the time you went below was your vessel on the right or the left hand side, going down? *A*. On the left-hand side.

Q. 184. Going down the river it would be on the left-hand side? *A*. Yes.

Q. 185. On which side was the tug and the barge? *A*. It seemed to me they had the best of the water, right in the middle of the channel.

Q. 186. Were they headed directly up or across the channel? *A*. I could not tell you whether they were heading directly; they appeared to be going directly up the channel.

Q. 187. This is the engineer's log of the Berkshire? *A*. Yes, sir.

Q. 188. What date was this? *A*. Aug. 16.

Q. 189. Whose handwriting is this in? *A*. Mine. All that book is mine.

Q. 190. And this is taken from the slate? *A*. Yes, sir; from the engine room slate.

Mr CARVER. I was simply going to offer it —

Mr. ROELKER. Objected to.

Mr. CARVER. I suppose you will allow us to put in a copy.

Mr. ROELKER. I object to it as not being the original entry. It is made up by the witness from information placed upon a slate by some other person, and therefore being hearsay and inadmissible. And it is stipulated that the transcript shall be put in with the same effect as the log book itself, and subject to the same objections. [*Marked* "Libellant's Exhibit A, F. H."]

Q. 191. What becomes of these entries on the slate after they are copied into the log book? *A*. They are rubbed out every day at twelve o'clock.

Cross Examination resumed by MR. ROELKER.

×-*Q*. 192. You do not make the entries on the slate yourself? *A*. If it is my watch I do.

×-*Q*. 193. On this day they were made by somebody else? *A*. The first assistant, yes, sir; the man on watch.

×-*Q*. 194. You think, if I understand you aright, that at the time you passed the Bay Queen your ship was about the centre of the channel? *A*. Well, as near as I could judge.

×-*Q*. 195. And afterwards she took the easterly side? *A*. No; after we got well down, when we saw the tug and barge, we went as far to the eastward as we could. At that time she seemed to be very near to the easterly side.

×-*Q*. 196. You never made any special study or examination of the channel? *A*. No, sir; never have.

×-*Q*. 197. You are simply giving your estimate? *A*. That is all.

×-*Q*. 198. When you say you brought the vessel to a full stop, do you mean full stop going through the water? *A*. Yes, sir; her headway was killed; she became motionless.

×-*Q*. 199. You mean at the time of the trial, do you? *A*. Yes, sir.

DEPOSITION OF EDWARD EVERETT CALDER.

Direct Examination by Mr. CARVER.

Q. 1. What is your full name? *A*. Edward Everett Calder.

Q. 2. Where do you reside? *A*. In Baltimore.

Q. 3. How old are you? *A*. Thirty-two.

Q. 4. You were the first assistant engineer on the steamship Berkshire at the time of her collision with the barge in Providence River? *A*. I was.

Q. 5. In August last? *A*. I was.

Q. 6. How long have you been engineer? *A*. In the neighborhood of nine years, I have been following the sea.

Q. 7. How long have you been on the Berkshire? *A*. Seven years on the eighteenth day of next August.

Q. 8. What position did you take when the vessel got ready to leave the wharf that afternoon? *A*. What position did I take? Explain yourself.

Q. 9. Where did you go? *A*. I was in the engine room, of course.

Q. 10. And you were in charge of the engine? *A*. I was.

Q. 11. Who else was with you? *A*. The oiler who was on watch with me.

Q. 12. You were not on deck during any of this time? *A*. I was not.

Q. 13. What was the first that you knew there was danger? *A*. Well, that is rather a wide question. The first I knew there was danger I knew we had struck something. That was my first apprehension of danger.

Q. 14. Was there any order that came from the indicator just before that? *A.* The first order I got was a bell.

Q. 15. What did the indicator indicate? *A.* Indicated slow. It was one bell, but one bell does not always indicate slow.

Q. 16. You have an indicator right in front of you? *A.* Right side of me. "Stop" is at the bottom; then there is two points on that side, and two on this, — go ahead slow, go ahead full speed; back slow and back full speed.

Q. 17. So the first order you got was to go slow? *A.* Yes, sir.

Q. 18. What was the next? *A.* The next was three bells in succession.

Q. 19. What did the indicator show? *A.* Showed "Back full speed."

Q. 20. How long was that after you got the first order? *A.* I should judge somewhere in the neighborhood of a minute. I would not say exactly. It was not a minute, judging from what I did in the meantime.

Q. 21. What did transpire in the meantime? *A.* I had to open the throttle and take off the cut-off.

Q. 22. How many revolutions was your engine making before you got this order full speed astern? *A.* I should judge she was making — she had slowed down to about thirty turns.

Q. 23. How many turns do you make when you go full speed ahead? *A.* Somewhere in the neighborhood of sixty-five.

Q. 24. How do your engines reverse? *A.* By steam.

Q. 25. But with regard to your levers, what do you do? Where do you stand before your engine? *A.* I stand right in front of the throttle and the reverse lever.

Q. 26. You have two levers? *A.* Yes.

Q. 27. What do you do when you reverse full speed astern? *A.* I reverse the links, and that reverses the valve.

Q. 28. How long does it take you to do that? *A.* That is a matter of about two seconds.

Q. 29. Was the engine in good working order at that time? *A.* The engine was in good working order.

Q. 30. How long does it take after you reverse before you have your engine working backwards? *A.* Somewhere about two seconds; a very short time.

Q. 31. After you have reversed full speed astern do your engines make more revolutions or less? *A.* They make more.

Q. 32. About how many revolutions do you make going full speed astern when you have reversed your engines? *A.* I should judge we were making in the neighborhood of seventy-five turns.

Q. 33. With regard to your ship that night, was she deeply loaded or was she light? *A.* I don't propose to know anything, at all about the ship's cargo.

Q. 34. Do you know? *A.* I do not. She was not deeply loaded, but just what her draft was I could not say.

Q. 35. Did you see the chief engineer before the collision took place? *A.* I did not.

Q. 36. And the chief engineer was not in the engine room until after the collision took place? *A.* The first I saw him was after I felt the shock.

Q. 37. Was the shock a severe shock? *A.* I thought we had struck a rock; it was quite a shock.

Q. 38. When you reverse your engines full speed astern does it shake your ship? *A.* Yes, sir.

Q. 39. Did it shake her that night? *A.* I think so.

Q. 40. Would you feel it in the engine room shake? *A.* Yes, sir.

Q. 41. How near were you to the levers when you got the bell for full speed astern? *A.* I was right at the lever.

Q. 42. Did you reverse them at once? *A.* Yes, sir.

Q. 43. Did you give her fresh steam? *A.* I gave her all I had.

Q. 44. How much steam did you have? *A.* Eighty pounds.

Cross Examination by Mr. ROELKER.

×-*Q.* 45. You say that you got a bell to go slow? *A.* I did, sir.

×-*Q.* 46. And then about a minute afterwards you got another bell astern? *A.* No, sir; I didn't say anything of the kind.

×-*Q.* 47. What did you say? *A.* The first bell I got was a slow bell; but that "minute" is a little different.

×-*Q*. 48. Well, how long was it? *A*. I should judge it was about ten seconds between these bells.

×-*Q*. 49. Ten seconds between the different bells? Didn't you say it was about a minute between the time when you got the first bell and the time you got one to go astern? *A*. No, sir. I said it was about a minute from the time I got the bell till the collision occurred.

×-*Q*. 50. Then you say that you got three bells in succession after the one, or three bells in all? *A*. Three in succession after the one.

×-*Q*. 51. So there was four in all? *A*. Yes, sir.

×-*Q*. 52. The first was to go slow? *A*. Yes, sir.

×-*Q*. 53. Did you execute the first order before you got the second? *A*. Yes.

×-*Q*. 54. Did the engine slow down? *A*. Yes, sir.

×-*Q*. 55. Then they came right along in succession ten seconds after each other? *A*. Came right in succession, three bells.

×-*Q*. 56. You think it was about two seconds after you got the first bell till you had her reversed? *A*. Yes, sir.

×-*Q*. 57. And from the time you got the first bell until you got the three bells was about a minute? *A*. Yes; it may have been a little more.

×-*Q*. 58. That is only your guess about it? *A*. I only judge by what I did in the meantime.

×-*Q*. 59. What did you do in the meantime? *A*. When I got the first bell I was at No. 2 main bearing with an oil cup in my hand, and I dropped the business and went to the throttle. By the time I got her slowed the other bells came.

×-*Q*. 60. Then in two seconds you had got her reversed; that was twelve seconds before you got her reversed? *A*. Yes, sir.

×-*Q*. 61. What else did you do? *A*. I jumped for my cut-off and ran that off.

×-*Q*. 62. How long did that take you? *A*. Probably half a minute or so.

×-*Q*. 63. As much as that? *A*. Not over that. There is about three steps to take, and you have got the screw to run off.

×-*Q*. 64. What else did you do? *A*. That is all there is to it.

×-*Q*. 65. Had you got your cut-off turned off when the collision occurred? *A*. I had just got through with it. I had left the cut-off, and was standing at the engine room door.

×-*Q*. 66. You say you thought you had struck a rock? *A*. Yes, sir.

×-*Q*. 67. Pretty severe jar, was it? *A*. Yes, sir.

×-*Q*. 68. How long before you got any other order? *A*. It was about two minutes from the time I got the first. Well, we backed about two minutes.

×-*Q*. 69. Just what order did you get? *A*. Got a bell to stop.

×-*Q*. 70. How long did you stop? *A*. I would not say; but I noted all this on the slate. I don't retain it in my head.

×-*Q*. 71. You put them down on the slate? *A*. To the best of my ability.

×-*Q*. 72. When did you note it? *A*. When I got the bells. The clock is there right alongside of me. I looked at the clock. That is the recognized rule for us to note all stops and slows.

×-*Q*. 73. You didn't put it down right then? *A*. No, sir.

×-*Q*. 74. How long after? *A*. When I got through backing on the first stop I went to the slate and noted the time.

×-*Q*. 75. Was it half an hour after? *A*. No, not ten minutes.

×-*Q*. 76. Was it before the collision or after? I am asking about these bells. *A*. I got them as they were given. Probably there was three or four minutes between the bells.

×-*Q*. 77. You are talking about this slow bell, do I understand? *A*. The first slow that I got I noted that after I found out we had been in collision when we stopped.

×-*Q*. 78. How long after? *A*. I would not say exactly. Probably three minutes.

×-*Q*. 79. When you got the bell to slow, do you mean to say you looked at the clock? *A*. I did, sir.

×-*Q*. 80. You remember this all very distinctly? *A*. Yes, sir; it was about three o'clock and two minutes.

×-*Q*. 81. Any minute hand on the clock? *A*. Yes, sir.

×-*Q*. 82. How many seconds? *A*. I didn't notice. Didn't get down to that.

×-*Q*. 83. The first bell came at 3.2? *A*. Yes, sir.

×-*Q*. 84. And the others right along within a few minutes? *A*. Yes, sir.

×-*Q*. 85. When did you first go on deck? *A*. When we got back to the wharf.

×-*Q*. 86. Were there any windows in the engine room so that you could look out and see what was going on? *A*. No, sir; we were away below the surface of the water in our engine room.

×-*Q*. 87. I supposed so; I am only asking for information. I understand you to say that before you got this order to slow your engine was making about sixty-five turns and had eighty pounds of steam? *A*. Yes, sir.

×-*Q*. 88. And when you slowed her down she made about thirty turns? *A*. Yes, sir.

×-*Q*. 89. And when she was reversed she was making about seventy-five turns? *A*. Yes, sir.

That is all.

DEPOSITION OF FRED SMITH.

Direct Examination by Mr. Carver.

Q. 1. What is your name, please? *A*. Fred Smith.

Q. 2. Where do you live, and how old are you? *A*. I live in Spain; am twenty-nine years old.

Q. 3. You are an oiler on the Berkshire? *A*. Yes, sir.

Q. 4. How long have you been oiler on her? *A*. Two years.

Q. 5. Were you oiler on board her at the time of the collision with the barge down the river? *A*. Yes, sir.

Q. 6. Were you in the engine room at the time? *A*. Yes, sir.

Q. 7. What were you doing just before the collision? *A*. I had just oiled the engine. I stayed at my post.

Q. 8. How far from the engineer were you? *A*. About seven feet — just in the middle of the engine room.

Q. 9. Where were you when you got the order full speed astern? *A*. I was in the middle of the engine room, on the grating.

Q. 10. In front of the engine? *A*. Yes, sir.

Q. 11. Did you feel any collision? *A*. Yes, sir.

Q. 12. How long do you think it was from the time that you heard the bells, and the indicator showed full speed astern, up to the time of the shock of the collision? *A.* About a minute.

Q. 13. What did you do in the meanwhile? *A.* I just stood at my post waiting for a time to oil again.

Q. 14. What did the engineer do, the first assistant engineer? *A.* As soon as he heard three bells astern he went and reversed the engines.

Q. 15. What else did he do? *A.* He had the oil can in his hand at the time the bells struck, and he put the oil can down and reversed the engines.

Q. 16. He threw one lever up and the other down, didn't he? *A.* Yes, sir.

Q. 17. What did he do then? *A.* He opened the throttle wide open, and let her go full speed all she could.

Q. 18. What did he do after that? *A.* I didn't notice anything.

Q. 19. Did he go back to his place? *A.* He was right there at his place.

Q. 20. You didn't see the collision at all yourself? *A.* No, sir.

Q. 21. The chief engineer was not in the room at all at that time? *A.* No, sir.

Q. 22. Did you stay down in the engine room till the vessel got back to Providence? *A.* I stayed down till everything was over, and we was going to Providence.

Q. 23. Did you see the barge at all? *A.* No, sir.

That is all.

[*Cross examination waived.*]

DEPOSITION OF THOMAS J. KEOUGH.

Direct Examination by Mr. CARVER.

Q. 1. Where do you reside? *A.* Boston.

Q. 2. What is your occupation? *A.* Sailor, or mariner, or whatever you call it. I am second officer on the ship.

Q. 3. How old are you? *A.* Forty-five.

Q. 4. How long have you been to sea? *A.* About twenty-eight years.

Q. 5. What class of vessels have you been in? *A.* Steamboats, brigs and barks and schooners.

Q. 6. In what capacity? *A.* Before the mast, and second mate.

Q. 7. You were the second mate, second officer of the Berkshire in August, 1893? *A.* Yes, sir.

Q. 8. How long had you been in the Berkshire at that time? *A.* About six weeks, I guess. Came there about the 1st of July.

Q. 9. How long have you been on the Baltimore line? *A.* About fifteen years.

Q. 10. How many times do you say you have been up Providence River? *A.* I could not tell exactly; I ran here once on the . . . . some six months; ran here two years on the Lackawanna, just before I came on to this ship.

Q. 11. And you came here once a week, didn't you? *A.* Yes, sir.

Q. 12. What time was it that your vessel left the wharf at Providence? *A.* 2.30; somewhere about there.

Q. 13. And you were bound from Providence to Norfolk? *A.* Yes, sir.

Q. 14. What did you do after you left the wharf, personally? *A.* Cleared away the lines and secured everything for sea.

Q. 15. What did you then do? *A.* Got the boat out. The small boat is generally got out after we get clear of the dock.

Q. 16. On which side of the vessel was the lifeboat that you speak of? *A.* On the port side.

Q. 17. Did you pass any steamers going down the river that day? *A.* I could not say we passed them. I saw two small steamers; the Petrel was one of them.

Q. 18. Did you see the steamer Bay Queen? *A.* Yes, sir.

Q. 19. Did you pass her that day? *A.* Yes, sir.

Q. 20. Was there any signals exchanged between you and the Bay Queen? *A.* Yes, sir; she blew one whistle and we blew one.

Q. 21. On which side did you pass? *A.* Port side.

Q. 22. Did you see a tug having a barge in tow? *A*. Yes, sir.

Q. 23. About how far distant was she when you first saw her? *A*. About a mile.

Q. 24. Where was she? *A*. Coming up Sabin's Point; between Bullock's Point and Sabin's Point.

Q. 25. Where was you at the time on the vessel? *A*. I was amidships, swinging out the boat.

Q. 26. On the port side? *A*. Yes, sir.

Q. 27. At that time had you passed the steamer Bay Queen? *A*. Yes, sir; she passed along while I was at the boat.

Q. 28. At the time you first saw the tow boat and the barge had you then passed the Bay Queen? *A*. No, sir.

Q. 29. At the time you first saw her? *A*. No, sir.

Q. 30. How did the barge bear from the vessel when you first saw her? *A*. About two points on the port bow.

Q. 31. How was the towboat towing the barge? *A*. She was ahead of her.

Q. 32. Connected by a hawser? *A*. Yes, sir.

Q. 33. How fast do you think the Berkshire was going from that time till just before the collision? *A*. Seven or eight miles an hour, I guess. Could not tell how fast she was going.

Q. 34. Do you know what time the collision took place? *A*. Three o'clock, five minutes past — somewhere round there.

Q. 35. Where were you when the collision took place? *A*. Standing outside the pilot house.

Q. 36. After you cleared away the boat, what did you do? *A*. Went forward.

Q. 37. How far forward? *A*. To the pilot house.

Q. 38. On which side? *A*. Port side.

Q. 39. What did you see after that? What took place? Just tell us what took place. *A*. When I got forward?

Q. 40. Yes; just tell us what took place, in your own language. *A*. I heard the captain tell the quartermaster to wheel hard a-starboard. Then I heard them ringing her back full speed.

Q. 41. Did you hear any whistle from the towboat at any time? *A*. No, sir.

Q. 42. Did your vessel whistle to the towboat? *A*. No, sir.

Q. 43. Would you have heard the towboat whistle if she had whistled after you first saw her? [*Objected to by Mr. Roelker.*] *A*. I don't know if I could hear her when I saw her first; she was quite a ways down the river.

Q. 44. How far could you hear it on a day like that? *A*. Two or three miles.

Q. 43. Was there much wind? *A*. Could not exactly say.

Q. 44. Was there any current or tide? *A*. There was tide.

Q. 45. How was it setting~~? *A*.~~ Ebb tide. Going with us.

Q. 46. How fast should you say it was setting at that time? *A*. Could not tell exactly. Two or three miles, perhaps.

Q. 47. Did you watch the towboat and barge from the time you first saw them? *A*. No, sir. When I saw her getting close I went forward.

Q. 48. How long was that before the collision took place? *A*. About three minutes. About five minutes from the time I started from the boat and called the mate.

Q. 49. When you got forward how did the towboat bear from your vessel? *A*. The towboat was just at our bow then, crossing our bow.

Q. 50. How far do you think they were from you? *A*. Twice the length of our ship when I got there, away from us.

Q. 51. Was the barge directly behind the towboat? *A*. I don't think she was.

Q. 52. Was she heading the same way the towboat was? *A*. No, sir.

Q. 53. Was her head more to port or to starboard than the towboat? *A*. She was heading more to starboard.

Q. 54. Will you take this piece of paper, presuming that your vessel is located at a place which we will designate by the letter "A", will you show where the towboat and the barge were with reference to your vessel when you went forward to the pilot house?

Mr. ROELKER. You mean when he was forward, or when he started?

Mr. CARVER. When he got forward.

A. When I got forward the towboat had just cleared our bow, and the barge was *there*.

Mr. Carver. B represents the towboat, and C represents the barge.

[*Diagram put in and marked* "Exhibit A, Thos. J. Keough."]

Q. 55. Where was you when the collision took place? *A*. Standing by the pilot house.

Q. 56. Did you see it plainly? *A*. Yes, sir.

Q. 57. With what did your vessel collide? *A*. With the barge.

Q. 58. And where did you strike the barge? *A*. She struck us on the port bow with her starboard bow.

Q. 59. Her starboard bow struck your port bow? *A*. Yes, sir.

Q. 60. Will you show us, presuming that X represents the Berkshire, by two pencils as a model, where the barge was when she was struck? What was the angle that they struck? *A*. They struck like *that*, her starboard bow and our port bow.

[*Witness draws diagram* Exhibit B, *showing the angle at which they struck.* Libellants' Exhibit B, Thomas J. Keough."]

Q. 61. Now will you show us where the tug was? *A*. The tug was on our starboard quarter.

Q. 62. Well, just show us. *A*. The tug was off here.

Q. 63. Was that the position of the three vessels at the time of the collision? *A*. Yes, sir. That is when I saw the towboat. I got up on the forecastle and she was on our starboard quarter.

Q. 64. How long was the hawser that connected the tug and the barge? *A*. I could not say exactly. I should say that there was room enough for another ship like ours between her and the towboat. It was quite a long hawser.

Q. 65. Well, how long is your ship? *A*. Two hundred and sixty feet.

Q. 66. Knowing the length of your ship, how long should you say the hawser was? *A*. I should say eighty fathoms. I could not say exactly.

Q. 67. Which was going the faster at the time the collision took place, your vessel or the towboat? *A*. We were going very slow. I don't know how fast she was going. We were very near stopped.

Q. 68. How were these two vessels, just before the collision, proceeding with reference to the channel? *A.* I could not tell you.

Q. 69. Were they going up stream or across? *A.* He was going up stream, trying to get round Sabin's Point.

Q. 70. Would there, or not, have been any collision, in your opinion, provided the barge had been alongside the towboat? [*Objected to by Mr. Roelker.*] *A.* We could have got clear of her.

Q. 71. Would there, or not, have been any collision, in your opinion, provided the barge had been directly astern of the towboat and heading the way she was? *A.* We should have passed the barge as well as we did the tug if she had been directly behind it.

Q. 72. What, in your opinion, was the cause of this collision? *A.* Well, I think a long tow line.

Q. 73. What could have been done aboard of your vessel to prevent a collision, that was not done? *A.* I don't know of anything more than to back full speed.

Q. 74. Do you know how much water your vessel was drawing at that time? *A.* Somewhere between fifteen and sixteen feet.

Q. 75. About how wide is the channel where the collision took place for vessels drawing fifteen to sixteen feet? *A.* I don't know exactly; somewhere round three hundred feet, I guess.

Q. 76. What was the result of the collision? What damage was done to the two vessels? *A.* Well there were two holes in our bow —

Q. 77. On which bow? *A.* The port bow.

Q. 78. What was done to the barge's bow? Any hole in that? *A.* I didn't see it; she went down in a little while.

Q. 79. Did the barge afterwards sink? *A.* Yes, sir.

Q. 80. What did you do as soon as the collision took place? *A.* I went forward on the forecastle.

Q. 81. What did you do after you got there? *A.* I looked over, and saw that the holes was over water, and we turned back, turned round again.

Q. 82. How is it usual for towboats to tow barges up Providence River in that locality? [*Objected to by* Mr. Roelker.] *A.* I have seen them tow alongside, and I have seen them tow them with short tow lines.

Q. 83. What do you call a short tow line? *A.* About forty or fifty fathoms for a river line, for Providence River.

Q. 84. At the time of the collision, on which side of the channel was the towboat? *A.* It was on the starboard side.

Q. 85. Starboard side coming down? *A.* It was on our starboard side.

Q. 86. That was the western side of the channel? *A.* Yes, sir.

Q. 87. Where was the barge? Which side of the channel? *A.* I could not say exactly. When we struck her?

Q. 88. Yes. *A.* It must have been on the port side.

Q. 89. Would it be the east or west side? *A.* On the east side.

Q. 90. Do you know how your vessel was heading at the time of the collision? *A.* No, sir. It was heading southwest, or southwest half south, or somewhere round there.

Q. 91. How was the towboat heading just before the collision? *A.* Could not tell exactly.

Q. 92. You didn't watch the course at all? *A.* No, sir.

Q. 93. Was there any room for the Berkshire to go on the starboard side of the channel, that is, on the western side of the channel? *A.* I don't think there was. I cannot say exactly. I don't know how wide that channel is.

Cross Examination by Mr. ROELKER.

×-*Q.* 94. You say you don't know how wide the channel is, Mr. Keough? *A.* No.

×-*Q.* 95. You were second mate? *A.* Yes.

×-*Q.* 96. And you cast off the lines, etc., and you saw to getting everything shipshape and snug after you started out? *A.* Yes, sir.

×-*Q.* 97. And you were busy attending to getting out the life boat? *A.* No, the small boat; getting it on the davits.

×-*Q.* 98. Anybody with you? *A.* Yes, sir; two men.

×-*Q.* 99. You were bossing the job? *A.* Yes, sir.

×-*Q.* 100. How long did it take you to do this? *A.* Took us about five minutes.

×-*Q.* 101. Where were you when you commenced it? *A.* Just when we got clear of the shipping.

×-*Q*. 102. Where do you get clear of the shipping? *A*. About Pomham.

×-*Q*. 103. When you got down to Pomham you commenced swinging this boat out? *A*. Yes, sir.

×-*Q*. 104. While you were swinging this out, do I understand you to say that the Queen passed you? *A*. We had it most all swung out when she passed us.

×-*Q*. 105. Where were you when the Queen passed you? *A*. Between Pomham and Sabin's.

×-*Q*. 106. About how far below Pomham? *A*. I could not say exactly; didn't take much notice.

×-*Q*. 107. You were not paying much attention? *A*. No, sir. I seen the boat pass us and heard her blow a whistle.

×-*Q*. 108. You seen her pass you? *A*. Yes, sir.

×-*Q*. 109. How would Pomham Light bear when she passed you? *A*. Couldn't say exactly.

×-*Q*. 110. You had got by the light? *A*. Yes, sir.

×-*Q*. 111. Where were you in the channel when she passed you? *A*. We generally get as near the middle of the channel as we can.

×-*Q*. 112. I do not understand you to say that you have looked that channel up specially. It is just looking from the buoys, is that it? *A*. Yes, sir.

×-*Q*. 113. When you say you were in the middle of the channel, you are judging from the buoys, are you not? How do you know where the middle of the channel is? *A*. It is buoyed off.

×-*Q*. 114. Then you judged from the buoys that you were in the middle of the channel? *A*. Yes, sir.

×-*Q*. 115. How close to you did she pass? *A*. About the width of our ship.

×-*Q*. 116. What is the width of your ship? *A*. I do not know exactly. I guess she passed at about twice the width of this room.

×-*Q*. 117. How long should you call this room? *A*. About fifteen feet or so.

×-*Q*. 118. Then you think she passed you about thirty or forty feet off? *A*. Yes, sir.

×-*Q*. 119. You did'nt notice this tug and tow until about the time you passed the Queen? *A*. No, sir.

×-*Q*. 120. How did you happen to notice her then? *A*. I don't know how I happened to notice her; I looked out and saw her.

×-*Q*. 121. You looked out over your port bow and saw her? *A*. Yes, sir.

×-*Q*. 122. How many points off your port bow was she then? *A*. About two points or two and a half.

×-*Q*. 123. How far away from you? *A*. I guess she was a mile off, not more.

×-*Q*. 124. And she was just rounding Sabin's Point? *A*. Just below, when I see her first.

×-*Q*. 125. And the tug was ahead of the tow? *A*. Yes, sir.

×-*Q*. 126. And they were pointing up the stream? *A*. Yes, sir.

×-*Q*. 127. How far from Sabin's Point were they? *A*. I could not tell exactly, I didn't take notice; just to look and see the tug and tow going up.

×-*Q*. 128. Were they pretty close to the light? *A*. They must be pretty close going up there.

×-*Q*. 129. How far, should you judge? *A*. I could not say; didn't take notice.

×-*Q*. 130. What did you do after you saw them? *A*. Went round and seen that everything was cleared up off the decks.

×-*Q*. 131. When did you next look at her? *A*. I looked at her when she was about three or four ship's lengths off. We were getting pretty close to her.

×-*Q*. 132. You didn't hear any whistling, you say? *A*. No, sir.

×-*Q*. 133. And she was three ship's lengths off ahead of you? *A*. Yes, sir.

×-*Q*. 134. And at that time on which side of your boat was the tug? *A*. She was on the port side.

×-*Q*. 135. When you saw her three ship's lengths off? *A*. Yes, sir.

×-*Q*. 136. And you then spoke to the mate, did you? *A*. I told the mate this barge was coming pretty close.

×-*Q*. 137. Where was the mate? *A*. Sitting down in his room.

×-*Q*. 138. What did he do? Walk forward with you? *A*. After me.

×-*Q*. 139. You got there first? *A*. Yes, sir.

×-*Q*. 140. And when you got forward, by the pilot house, you heard the captain tell somebody, the quartermaster, to put the wheel hard a-starboard? *A*. Yes, sir; she was going ahead when the wheel was hard a-starboard.

×-*Q*. 141. How long after he did that did he give the order to slow down, or put her astern? *A*. Gave it right away.

×-*Q*. 142. Well, how long? *A*. Probably half a minute; could not say exactly.

×-*Q*. 143. Within half a minute? *A*. Could not say exactly.

×-*Q*. 144. When you got down forward, Mr. Keough, and you heard this order given by the captain, how far from you was the tug and the barge then? *A*. About two lengths off, as far as I could judge.

×-*Q*. 145. And the tug was then still on the port side of you? *A*. The tug was then just across our bow.

×-*Q*. 146. And the barge was where? *A*. On our port bow.

×-*Q*. 147. Did you see the hawser? *A*. Yes, sir.

×-*Q*. 148. Was it taut? *A*. Well, it was not very taut.

×-*Q*. 149. You could see it above the water, could you? *A*. Yes, sir.

×-*Q*. 150. And how was the barge heading? *A*. Could not say exactly.

×-*Q*. 151. When you got to that point, where were you with reference to Sabin's Point Lighthouse? *A*. Just about abreast of it.

×-*Q*. 152. Just to the westward of it? *A*. Yes.

×-*Q*. 153. How far to the westward? *A*. Passed close to the buoys; close as we could go.

×-*Q*. 154. How close? *A*. Pretty near up to the buoy.

×-*Q*. 155. Within a few feet? *A*. Yes, sir.

×-*Q*. 156. The captain, you say, was in the pilot house? *A*. Yes, sir.

×-*Q*. 157. He gave this order to put the wheel hard a-starboard. Had the course been changed up to that time? *A*. I didn't notice;

I heard him say "Put the wheel hard a-starboard," and I suppose her course changed.

×-*Q*. 158. That is the first order you heard given? *A*. Yes, sir; I didn't look in the pilot house until I heard him say "Wheel hard a-starboard."

×-*Q*. 159. That is the only order you heard him give? *A*. Yes, sir.

×-*Q*. 160. Immediately after that you heard him say "Ring to put her hard astern?" *A*. Yes, sir.

×-*Q*. 161. Could you tell that there was any reversing of the engines? *A*. Yes; I looked over the side and saw the propeller working, saw the water churning.

×-*Q*. 162. And you felt the trembling of the ship? *A*. Yes, sir.

×-*Q*. 163. How long after that order was given did the collision occur? *A*. I should say it was a minute; couldn't tell exactly.

×-*Q*. 164. You think you were within two ship's lengths of her when that order was given? *A*. Yes, sir.

×-*Q*. 165. And your ship is about two hundred and sixty feet long? *A*. Yes, sir.

×-*Q*. 166. And you should think it was a little more than five hundred feet off? *A*. Yes, sir.

×-*Q*. 167. You say you struck her on the starboard bow? *A*. Yes, sir.

×-*Q*. 168. With your port bow? *A*. Yes, sir.

×-*Q*. 169. Did you notice a sudden sheering of your vessel after that order was given to put the wheel hard a-starboard? *A*. No, sir.

×-*Q*. 170. Did you notice that she responded to the wheel? *A*. No, sir.

×-*Q*. 171. You don't know whether she did or not? *A*. No, sir.

×-*Q*. 172. Couldn't you tell by the land? *A*. I suppose I could if I had looked; I didn't notice.

×-*Q*. 173. When you back, you say the boat generally backs to starboard. Is that under all circumstances, or only when the wheel is hard a-starboard? *A*. It will do that no matter how the wheel is.

×-*Q.* 174. Is that peculiar to the Berkshire? *A.* It is so with every steamer I have ever been in.

Mr. CARVER. She has a right-handed propeller, hasn't she? *A.* Yes, sir. But in every steamer I have ever been in, the bow falls off when she backs.

×-*Q.* 175. About this tow line, — you would not undertake to swear within a few fathoms how long it was? *A.* No, sir; when I was on the forecastle I looked at the towboat and she was then just across our bow, and I thought then that there was room enough for another ship between the towboat and the barge.

×-*Q.* 176. You don't know whether the tow line was parted or not? *A.* No, sir.

×-*Q.* 177. You think that a tow line of forty or fifty fathoms would have been of sufficient length there? That would be your judgment? *A.* Yes, sir.

×-*Q.* 178. Are you still working for this company, Mr. Keough? *A.* Yes, sir.

×-*Q.* 179. On board which vessel? *A.* The Berkshire.

×-*Q.* 180. Did the mate make any remark to you when you came forward there? *A.* I don't remember now, sir.

×-*Q.* 181. Do you know what the width of the channel is at this point where the collision occurred? *A.* I do not, sir.

That is all.

Direct Examination resumed by Mr. CARVER.

Q. 182. I want to ask you one or two questions. Could you tell as to whether or not the barge and the tug were swinging just before the collision? *A.* No, sir; as far as I could see the towboat she seemed to be trying to haul her round Sabin's point.

Q. 183. Haul her round which way? Do you mean that she was taking the course of an arc of a circle. *A.* Yes, sir; if the barge was right astern we would have cleared her as well as we did the towboat.

Q. 184. On which quarter of the towboat was the barge? You say she was not directly astern. On which side was she? *A.* On the starboard side of the towboat.

Q. 185. Then she was making a circle round to the eastward? *A.* Yes, sir.

Q. 186. Can you make any estimate as to how fast the tug and barge were going at that time? *A.* I could not tell.

Q. 187. Do you think she was going at all? *A.* Yes, sir.

Q. 188. Which was going the fastest? *A.* She was going faster than our vessel. I don't think we would hurt anything the way we were going.

Mr. ROELKER. You did hurt something, didn't you? *A.* I don't know, sir.

DEPOSITION OF PETER KEINE.

Direct Examination by Mr. CARVER.

Q. 1. What is your name? *A.* Peter Keine.

Q. 2. Where do you live, and how old are you? *A.* I was born in Ireland.

Q. 3. Where do you live now? *A.* My people live in Brooklyn, N. Y.

Q. 4. How long have you been to sea? *A.* About ten years.

Q. 5. You was on the Berkshire in August, at the time of the collision with the barge? *A.* Yes, sir.

Q. 6. How long have you been on her? *A.* Thirteen months the 15th of this month, sir.

Q. 7. And you was quartermaster aboard of her? *A.* I was sailor first, and then I was quartermaster.

Q. 8. You were quartermaster at the time of the collision? *A.* Yes, sir.

Q. 9. Where was you after the Berkshire left the wharf? *A.* I was standing at the wheel.

Q. 10. And the wheel is in the pilot house? *A.* Yes, sir.

Q. 11. Who else was in the pilot house besides yourself? *A.* The captain.

Q. 12. Where was the captain? *A.* The captain was standing on the port side, and then he shifted and came on the starboard side.

Q. 13. Were the windows of the pilot house open? *A.* Yes, sir.

Q. 14. The Berkshire steers by steam? *A.* Yes, sir.

Q. 15. Has she a brass wheel? *A.* She has a small brass wheel and a big wheel.

Q. 16. What is the diameter of the brass wheel? *A.* Could not say.

Q. 17. Small, is it? *A.* Yes, sir.

Q. 18. Is it easily turned? *A.* It turns like a lever; you just turn it backward and forward. Then there is a big wheel abaft of that.

Q. 18½. That is, in case the steam apparatus gives out you can use the big wheel? *A.* Yes, sir.

Q. 19. Which side of the wheel do you stand on? *A.* The starboard side.

Q. 20. Did you pass any steamers going down? *A.* Yes, sir; we passed the Bay Queen.

Q. 21. When you approached the Bay Queen were any signals given? *A.* Yes, sir; we blew one whistle.

Q. 22. Was it answered? *A.* The Bay Queen answered with one whistle.

Q. 23. Did the captain give you any orders then? *A.* Yes; he told me to port the wheel a little.

Q. 24. Did you obey that order? *A.* Yes, sir; ported a little.

Q. 25. How much did your vessel change her course? *A.* Could not say; I didn't look at the compass.

Q. 26. How much should you think, under that helm? *A.* I should say about a quarter of a point.

Q. 27. What was the next order you got from the captain? *A.* The captain told me to keep her on her course.

Q. 28. Had you passed the Bay Queen then? *A.* Yes, sir.

Q. 29. Did you obey that order? *A.* Yes, sir.

Q. 30. How much did the vessel swing on her starboard helm? *A.* She came back on her course and I kept her there.

Q. 31. What were you steering by? *A.* We have a mark ashore.

Q. 32. What was that mark? *A.* I could not say.

Q. 33. Who gave you that mark? *A.* The captain would be looking out, and when he would see a new point he would tell me to steady. We had a mark and kept the vessel's head towards it.

Q. 34. Who pointed that mark out to you? *A.* The captain. He told me to steady.

Q. 35. You stated that after you passed Bay Queen you steadied? *A.* Yes, sir.

Q. 36. What was the next order you got from the captain? *A.* He told me to starboard the wheel.

Q. 37. Did you obey that order? *A.* Yes, sir.

Q. 38. What was the next order you got from the captain? *A.* Hard a-starboard.

Q. 39. Under the order starboard, just before the hard a-starboard, how much did your vessel swing? *A.* She swung a little, and then stopped, aud didn't go any more.

Q. 40. How much did she swing under the order hard a-starboard. *A.* She didn't swing any.

Q. 41. Were any bells rung to the engine room? *A.* Yes, sir; after the wheel was put hard a-starboard.

Q. 42. How long after the wheel was put hard a-starboard were the bells given to the engineer? *A.* Couldn't say, sir.

Q. 43. Was it a long time or a short time? *A.* Couldn't say.

Q. 44. Couldn't you state it in minutes, or to the best of your judgment? *A.* Couldn't say.

Q. 45. You say that the captain rang some bells. What did he do? *A.* He stopped her, and then ran full speed astern.

Q. 46. Could you see the indicator? *A.* I didn't look at the indicator at that time I was looking at the vessel's head.

Q. 47. How did you know that he gave the order full speed astern? *A.* Heard the bells.

Q. 48. What bells did you hear? *A.* I heard the bell to stop, and then I heard the bell full speed astern.

Q. 49. Did you see the barge and the tugboat before you passed the Bay Queen? *A.* I didn't take any notice.

Q. 50. At the time you passed the Bay Queen, where was the captain? In the pilot house? *A.* He was standing on the starboard side, looking out through the starboard window.

Q. 51. Was that window open? *A*. Yes, sir; the window was down.

Q. 52. When the order was given to starboard did you see the tugboat and the barge? *A*. Yes, sir; I seen the tugboat; she was on our starboard bow.

Q. 53. And where was the barge? *A*. On our port bow.

Q. 54. And how was her course with regard to yours? *A*. She was heading right across our bow, sir.

Q. 55. When the order starboard was given, before the order hard a-starboard, what was the position of the tugboat at that time? *A*. She was on our starboard bow.

Q. 56. And the barge was where? *A*. On the port bow, sir.

Q. 57. Did you see the vessels as they came together? Did you see the barge? *A*. Yes, sir; but I didn't take much notice.

Q. 58. What were you doing? *A*. I was standing in the pilot house.

Q. 59. Could not you see? *A*. There was steam coming out of the boilers. You could not tell very much.

Q. 60. Did you hear any whistle from the tug? *A*. No, sir.

Q. 61. Did you see any steam coming out of the tug's whistle? *A*. No, sir.

Q. 62. The tug was towing the barge with a hawser, was she not? *A*. Yes, sir.

Q. 63. How long should you say that hawser was? *A*. I could not tell exactly the length of that hawser. It might have been between ninety and one hundred fathoms.

Q. 64. Why do you think it was from ninety to one hundred fathoms? *A*. Because it looked pretty long. The tug was away astern of us when we struck the barge on her starboard side.

Q. 65. You say that when the order starboard was given, that the tugboat was on your starboard bow, and that the barge was on your port bow? *A*. Yes, sir.

Q. 66. You were heading directly between the two of them? *A*. Yes, sir.

Q. 67. How were you with reference to the hawser? Were you nearer towards the bow of the barge or nearer to the stern of the tug? *A.* We were heading a little more to the stern of the tug than to the barge; nearly amidships.

Q. 68. How long do you think it was from the time the captain gave the order full speed astern up to the time the collision took place? *A.* I could not say, sir.

Q. 69. What is your best judgment? *A.* It would be about a minute.

Q. 70. Could you feel the vessel shake under the reversal of the engines? *A.* Yes, sir.

Q. 71. Did it shake the pilot house? *A.* Yes, sir.

Q. 72. Your pilot house is how far from the bow? *A.* I do not know.

Q. 73. Is it forward or amidships? *A.* It is more forward than it is amidships.

Q. 74. How high is it above the deck? *A.* Don't know, sir.

Q. 75. How high should you judge? *A.* Couldn't say, sir.

Q. 76. Suppose that the order the captain had given, instead of being starboard or hard a-starboard, was port or hard aport? *A.* I think we would have gone right into the tugboat.

Q. 77. Do you think of anything more that could have been done to prevent this collision? *A.* I do not, sir.

Cross Examination by Mr. ROELKER.

×-*Q.* 78. How long have you been quartermaster? *A.* That was the first trip I was quartermaster.

×-*Q.* 79. Up to that time you had been a sailor, and that was the first time you were quartermaster? *A.* That was the first time on that boat; but I have steered a boat before that.

×-*Q.* 80. What boat have you steered? *A.* I have never been quartermaster only in this boat.

×-*Q.* 81. And this was the first time you had been quartermaster in her? *A.* Yes, sir.

×-*Q.* 82. How long had you been in the boat then? *A.* About seven months.

×-*Q.* 83. You don't pretend to know the course in Providence Harbor yourself? You were taking orders from the captain? *A.* Yes, sir.

×-*Q*. 84. And when he gave the order you obeyed it. He had the responsibility? *A*. Yes, sir.

×-*Q*. 85. You say that you passed this Bay Queen. Where were you? *A*. We passed the Bay Queen on the port side.

×-*Q*. 86. Where were you in the river? *A*. About half way between the two lights.

×-*Q*. 87. Between Pomham and Sabin's Point? *A*. As near as I can tell you.

×-*Q*. 88. And she passed how close to you? *A*. I could not say, sir.

×-*Q*. 89. Pretty close? *A*. Yes, sir.

×-*Q*. 90. Were you about the middle of the channel? *A*. I don't know.

×-*Q*. 91. You don't know anything about that? *A*. No, sir.

×-*Q*. 92. Was the captain standing in front of you at this starboard window? *A*. I was on the starboard side, and he was standing a little on the starboard side of me; he was looking out of the window.

×-*Q*. 93. You did not pay much attention to what was in the river? *A*. No, sir.

×-*Q*. 94. You were looking out for the captain to take care of that? *A*. Yes, sir.

×-*Q*. 95. What was the first you saw of this barge? *A*. The first I seen was the tugboat. After we passed the Bay Queen I seen her come across our bow.

×-*Q*. 96. You say that the first you saw of her was when you passed the Bay Queen? *A*. That is the first I noticed her.

×-*Q*. 97. How far off was she then from you, when she was going across your bow? *A*. How far off was she? I could not say, sir.

×-*Q*. 98. As near as you can tell? *A*. I could not say, sir; she was perhaps two ship's lengths off.

×-*Q*. 99. Two of your ship's length? *Q*. Yes, sir.

×-*Q*. 100. Do you know what your ship's length is? *A*. I don't know; I think she is about three hundred or four hundred feet.

×-*Q*. 101. How do you get at the length of it? *A*. By looking at it.

×-*Q*. 102. How far on your starboard side had she got — how many points? *A*. Hadn't got any points at all when I first saw her.

×-*Q*. 103. Did you say anything to the captain about it? *A*. No, sir.

×-*Q*. 104. Did the captain say anything to you? *A*. No, sir.

×-*Q*. 105. How long was it after she crossed your bow that you starboarded your wheel? *A*. The hawser was about half way across; when she got about half way, pointing right across the hawser, the captain told me to starboard the wheel.

×-*Q*. 106. So you starboarded the wheel? *A*. Yes, sir.

×-*Q*. 107. How much did she swing? *A*. About a quarter of a point.

×-*Q*. 108. That is all the swinging she did? *A*. I was not looking.

×-*Q*. 109. You were watching her head; and you found that she swung about a quarter of a point? *A*. About that.

×-*Q*. 110. How near were you to the tug and the tow? *A*. About a ship's length off.

×-*Q*. 111. When you did the swinging? *A*. Yes, sir.

×-*Q*. 112. Did he give any bells then? *A*. No, sir.

×-*Q*. 113. Who gave the bells then? *A*. He didn't give any bells until after I had put her hard a-starboard.

×-*Q*. 114. You did put her hard a-starboard? *A*. Yes, sir.

×-*Q*. 115. And she didn't answer to her wheel? *A*. No, sir.

×-*Q*. 116. What did he do then? *A*. He rung to stop, and then rang for full speed astern.

×-*Q*. 117. First he gave one bell to stop; and then he rang her full speed astern, — that was three bells? *A*. Yes, sir.

×-*Q*. 118. That made four bells in all? *A*. Yes, sir.

×-*Q*. 119. How close were you to the barge when he commenced to give these bells? *A*. About half a ship's length.

×-*Q*. 120. Did you notice this Sabin's Point lighthouse? *A*. No, sir; I didn't notice that.

×-*Q*. 121. Did you notice the buoy there? *A*. No, sir.

×-*Q*. 122. Didn't look out at all at any of these things? *A*. No, sir.

×-*Q*. 123. You say that this was a long hawser. Who first asked you how long that hawser was? *A*. I don't know; the captain did.

×-*Q*. 124. How long did he say it was? *A*. I don't know what he said.

×-*Q*. 125. Didn't he say the hawser was too long? *A*. He didn't say anything; he said it was a very long hawser.

×-*Q*. 126. He asked you if you didn't think it was? *A*. Yes, sir.

×-*Q*. 127. And you told him it was? *A*. I don't know.

×-*Q*. 128. When was this? *A*. Afterwards, when we were coming up the river. I didn't take much notice of the hawser.

×-*Q*. 129. When he asked you about this hawser, did he tell you he thought it was about ninety or a hundred fathoms long? *A*. Yes, sir.

×-*Q*. 130. Did you say so? *A*. I said I thought it was between ninety and one hundred fathoms.

×-*Q*. 131. You had not measured it, I suppose. *A*. I thought by the look of the thing it was that long. I cannot tell to an inch.

×-*Q*. 132. Can you tell within fifty feet? *A*. I can give a judgment.

×-*Q*. 133. You give this as your judgment? *A*. Yes; the same as you judge anything.

×-*Q*. 134. You know this Berkshire, — you have been travelling in her all this time, and you cannot tell how many feet she is? *A*. No, sir.

×-*Q*. 135. But you think you can tell how long a hawser is by looking at it? *A*. Yes, sir.

×-*Q* 136. When did you first look at it? *A*. When we struck.

×-*Q*. 137. Did you see that hawser when you looked after you struck? *A*. Yes, sir; I seen the vessel.

×-*Q*. 138. But did you see any hawser? *A*. No, sir.

×-*Q*. 139. Do you know, as a matter of fact, whether that hawser had not been cut by the collision? *A*. I think the hawser was cut, because she was towing the barge with a hawser, and we went where the hawser was.

×-*Q*. 140. Whether the tug was a quarter of a mile off, or not, that does not make any difference, does it? *A*. No, sir.

DEPOSITION OF THOMAS CALLAHAN.

Direct Examination by Mr. Carver.

Q. 1. What is your name? *A*. Thomas Callahan.

Q. 2. Where do you live? *A*. Providence.

Q. 3. What is your occupation? *A*. Sailor.

Q. 4. How long have you been to sea? *A*. Nineteen years this fall, sir.

Q. 5. And you was on board of the Berkshire at the time of the collision? *A*. I was, sir.

Q. 6. In August last? *A*. Yes, sir.

Q. 7. In what position were you on board the Berkshire? *A*. I was in the capacity of seaman, sir.

Q. 8. Where were you on board the Berkshire when you were coming down the river before the collision? *A*. I was on deck, sir, and I heard somebody singing out, "There is a barge coming up", and I went up on the forecastle ahead, and the tug and barge was coming along I should say about four miles a hour. Pretty soon I saw that the barge could not clear us, and she was going to strike us about amidships, and we swung off and we came right on to her cathead.

Q. 9. What part of your vessel did she come into? *A*. Our port bow.

Q. 10. And you struck her on the starboard bow? *A*. We struck her starboard cathead; yes, sir.

Q. 11. How far should you say that you were from the barge when you came on the forecastle head? *A*. We were just about the length of the tow line, I should judge.

Q. 12. How long was that? *A*. About between ninety and one hundred fathoms.

Q. 13. Is that the usual length of line used in towing up the river? *A*. That is the length they use in towing out at sea.

Q. 14. You say that at the time you came out on the forecastle you was about ninety to one hundred fathoms from the barge. Where was the tug? *A.* At that time the tug was past our stem; she was on our starboard bow then.

Q. 15. Were you right in the centre of your vessel, or were you on either side? *A.* I was up in the bow.

Q. 16. Did you watch everything that occurred? *A.* I did for a while, but when the donkey boiler on board the barge busted the steam came out pretty freely, and then I got down.

Q. 17. Did you remain there until the collision took place? *A.* Yes, sir.

Q. 18. Did you notice as to whether or not the tow line between the tug and the barge parted before the collision? *A.* If I am not mistaken it was let go from the towboat.

Q. 19. Before or after the collision? *A.* Before the collision. The line was fast when she ran into us. It did not touch the water at all. When she struck us the line was let go from the towboat.

Q. 20. When you came on the forecastle head how was the tug boat heading with reference to your course? *A.* Well, I don't know what our course was.

Q. 21. Was she going across your course, or the opposite course from you? *A.* She was rounding Sabin's Point. We were just about on the turn ourselves.

Q. 22. Suppose that this line here should represent your course. I want you to show me the line of the tug's course, and the barge's course. *A.* We were close in to the lighthouse. If we had backed any we would have gone upon the rocks.

Q. 23. On which side of the channel were you? On the east or the west? *A.* On the east side.

Q. 24. Was it on your port side or your starboard side that your vessel was near the rocks? *A.* On our port side. That is the east side.

Q. 26. Was the barge heading the same course as the tug at that time? *A.* No, sir. The tug came round the point and the barge was swinging round. The barge got round the lighthouse and came right in on us.

Q. 26. Which was heading up stream most, the barge or the tugboat? *A.* The tugboat.

Q. 27. How many more points up stream should you think the tugboat was heading than the barge? *A.* About how many? A point and a half.

Q. 28. Providing the barge had been heading the same course as the tug, in your opinion, would or not there have been any collision? [*Objected to by* MR. ROELKER.] *A.* It could not have been avoided. There was too much headway on the barge for her to clear us anyway.

Q. 29. Which was going the faster, the tug and barge or your steamer? *A.* We were not going at all, sir. We were stopped. Captain Hooper rang the bells for to back her away back as far as we could. If we were going any at all we would have gone clean through her.

Q. 30. Could your vessel have gone any more to port? *A.* She could have gone to port, but that would not have done any good. The tow line would have stopped us. We could not go to starboard on account of the lighthouse.

Q. 31. If you ported the helm, you mean you would have swung off to starboard, and that would have brought you across the tow line; and if you had gone to port she would have struck you amidships? *A.* We could not starboard our helm; no, sir.

Q. 32. That is your opinion, is it? *A.* Yes, sir.

Q. 33. Where were you before you were on the forecastle head? *A.* I was on deck; it was my watch on deck.

Q. 34. What were you doing? *A.* Nothing in particular; walking forward; and some one came along and sang out that there was going to be a collision.

Q. 35. Did you see the barge and tug before you went on deck? *A.* I seen the spars sticking out over the rail. I went on and saw the tug just passing our stem, ahead of us.

Cross Examination by MR. ROELKER.

×-*Q.* 36. You say that you were on deck? Walking on deck? *A.* I was walking forward. I was going on the forecastle.

×-*Q.* 37. The forecastle is raised? *A.* Yes, sir.

×-*Q.* 38. It is forward on the main deck? *A.* Yes, sir.

×-*Q.* 39. You didn't see anything, then, of either barge or tug until somebody sung out that there was going to be a collision? *A.* No, sir; and then I looked over the port rail and saw the barge passing us.

×-*Q.* 40. How near were they then? *A.* About a hundred yards; but they were still swinging to port.

×-*Q.* 41. Did you go up near the pilot house at that time? *A.* No, sir; I did not.

×-*Q.* 42. Did you hear the bells? *A.* I heard two bells when I was on the main deck.

×-*Q.* 43. That is, before you went up on the forecastle? *A.* Before I went up on the forecastle.

×-*Q.* 44. And before that you didn't hear anything? *A.* No, sir.

×-*Q.* 45. When you came up you found the tug was on the starboard side of your steamer, and the barge was on your port bow, and you were heading midway between the two, athwart this hawser? *A.* Yes, sir.

×-*Q.* 46. At the time you got up there had you stopped? *A.* We were stopped; yes, sir.

×-*Q.* 47. How long did it take you from the time you started to get up on to the forecastle? *A.* About two minutes.

×-*Q.* 48. How fast were you going then? *A.* We were not going any more than half speed.

×-*Q.* 49. When did you commence to slow, in your opinion? *A.* We went the one speed ever since we left the dock, India Point.

×-*Q.* 50. When did you first commence to slow up? *A.* I could not say; all I heard was the two bells to stop.

×-*Q.* 51. How long did it take you to get to the forecastle?

×-*Q.* 52. How long did it take you to go to the forecastle? *A.* Two minutes.

×-*Q.* 53. How far is it? *A.* Oh, not far; but I went to look over the side.

×-*Q.* 54. You say that when this collision occurred, you were very close to the rocks at Sabin's Point? *A.* Yes, sir.

×-*Q.* 55. How were you with reference to the lighthouse? *A.* We were right close to the lighthouse, about fifty or seventy-five yards.

×-*Q*. 56. How close to the buoy? *A*. I didn't notice the spar buoy at all. I didn't look for that.

×-*Q*. 57. You were within fifty or seventy-five yards of the light house on which side? *A*. Just about abreast of the lighthouse; pretty near abreast of it.

×-*Q*. 58. This tug was pretty close to you on the starboard side? *A*. He was about three points; after he struck us he lay three points on our starboard bow.

×-*Q*. 59. And about how far distant from it? *A*. About a hundred fathoms.

×-*Q*. 60. That was after you had struck? *A*. After we struck.

×-*Q*. 61. Before you struck, what difference was between the tug and the tow in regard to pointing? *A*. We passed her quite a distance, about fifty fathoms say, along.

×-*Q*. 62. I mean in the way they were pointing in their courses? Which way was the tug pointing? *A*. She was going across, sir.

×-*Q*. 63. In what direction? *A*. About north.

×-*Q*. 64. And the tow, when you first saw her, which way was she heading? *A*. She was on the swing, sir; heading round.

×-*Q*. 65. He was steering right after the tug, wasn't he? *A*. Yes, sir; the barge was.

Direct Examination resumed by Mr. CARVER.

Q. 66. Do you mean that she was heading the same course? *A*. She could not be heading the same course when she was swinging.

Q. 67. If the tug was heading north, what should you say the barge was heading? *A*. Well, now, as far as the points of the compass goes, coming up that day I could not say.

Q. 68. We will say that the tug beat was heading due north. We will suppose that. If the tugboat was heading due north, what course should you say the barge was heading? *A*. I don't know. I could not say any course at all, because the barge was going right round all the time.

Q. 69. Changing her course all the time? *A*. Coming round the point.

DEPOSITION OF LUTHER E. HOOPER.

Direct Examination by Mr. Carver.

Q. 1. What is your full name? *A.* Luther E. Hooper.

Q. 2. Where do you live? *A.* Baltimore.

Q. 3. How old are you? *A.* Fifty-seven.

Q. 4. And you are a master? *A.* Master mariner.

Q. 5. How long have you been a master? *A.* I have been master and first officer for about twenty-seven years.

Q. 6. On steamers? *A.* Steamers; yes, sir.

Q. 7. And you were master of the Berkshire at the time this collision occurred in August, 1893? *A.* I was.

Q. 8. You are a licensed pilot for these waters? *A.* Yes, sir.

Q. 9. How long have you been a licensed pilot for these waters? *A.* I suppose about seventeen years.

Q. 10. And how much of that period have you been in and out of Providence Harbor? *A.* I have been running up and down here for about eight or nine years.

Q. 11. About what time was it when the Berkshire left Providence? *A.* 2.30.

Q. 12. Bound to Norfolk and Baltimore? *A.* Norfolk, Newport News and West Point.

Q. 13. Oh, you didn't go to Baltimore then? *A.* Didn't go to Baltimore at that time.

Q. 14. How long a ship is the Berkshire? *A.* Two hundred and sixty feet.

Q. 15. And about how wide? *A.* Forty-three feet.

Q. 16. She is an iron screw steamer? *A.* Iron screw steamer.

Q. 17. What kind of propeller? *A.* Right-handed.

Q. 18. What kind of engines? *A.* Compound.

Q. 19. What is her full speed? *A.* She is built for eleven knots.

Q. 20. How deep was the Berkshire when she left port that day? She was about 14.6, I think.

Q. 21. Forward or aft? *A.* Aft.

Q. 22. How much forward? *A.* About 11.10, I think it is.

Q. 23. Where were you after the vessel left the wharf? *A.* In the pilot house.

Q. 24. And what time was it when she left the wharf? *A.* 2.30.

Q. 25. Is that the time you took from the pilot house clock? *A.* That is the time, sir.

Q. 26. Who else was in the pilot house besides yourself? *A.* The quartermaster.

Q. 27. He was at the wheel? *A.* At the wheel.

Q. 28. Your vessel steers by steam? *A.* Steam, sir.

Q. 29. You have an indicator in the pilot house in regard to the engines? *A.* Yes, sir.

Q. 30. How high above the deck is the pilot house? *A.* Eight feet.

Q. 31. How far is it from the pilot house to the stem of your vessel? *A.* About forty-five feet.

Q. 32. You say that it is eight feet above the deck. Do you mean to say that the pilot house is eight feet above the main deck? *A.* Above the hurricane deck, the upper deck.

Q. 33. The pilot house is circular? *A.* Yes, sir.

Q. 34. Windows in it? *A.* All around, sir; see anywhere.

Q. 35. Do you remember what date it was the collision took place? *A.* The 16th of August.

Q. 36. Last year? *A.* Yes, sir.

Q. 37. What kind of a day was it? *A.* Well, it was clear, and light wind.

Q. 38. What direction was the wind? *A.* Southerly.

Q. 39. How much of a breeze? A. I don't know as there was over three knots.

Q. 40. How was the tide? *A.* Ebb.

Q. 41. About what was the strength of the tide at that time? *A.* About two to three knots.

Q. 42. Do you know how long it was after high water? *A.* I think it was near about low water.

Q. 43. Coming down Providence River did you meet any vessels? *A.* Met some small steamers, and then I met the Bay Queen.

Q. 44. As to whether or not you saw a tug having a barge in tow? *A*. I did after I hauled round Pomham.

Q. 45. At that time had you passed the Bay Queen? *A*. No, sir; I had not passed the Bay Queen.

Q. 46. How far distant was the tug and the barge when you first saw her? *A*. Well, half a mile.

Q. 47. When you came by the Bay Queen was there any signals exchanged between you? *A*. Yes, sir.

Q. 48. What signal and from whom? *A*. The Bay Queen blowed one whistle and we answered it.

Q. 49. On large steamers does the duty of blowing first devolve upon the outgoing or the incoming steamer? [*Objected to by* Mr. ROELKER *as being a matter of law*.] *A*. The outgoing.

Q. 50. What did you do when you came by the Bay Queen? What order did you give? *A*. Ported my wheel.

Q. 51. Gave the order to port the wheel? *A*. Yes, sir.

Q. 52. Was this just before or just after he whistled? *A*. I ported my wheel when he blowed the whistle.

Q. 53. How much did that change your course to starboard? *A*. About three quarters of a point.

Q. 54. You passed him on the port side? *A*. Port side.

Q. 55. Where was you in the pilot house? *A*. On the starboard side.

Q. 56. Were you at or near any windows, and what were you doing? *A*. Looking out the window.

Q. 57. Was the window that you were looking out of open or closed? *A*. Open.

Q. 58. On which side? *A*. Starboard side .

Q. 59. Was any signal blown to your vessel from the tug? *A*. No.

Q. 60. Did you blow any whistle to the tug? *A*. No, sir.

Q. 61. As, you was passing the Bay Queen how did the barge and the tug bear from your vessel? *A*. Well, the barge was, just after I passed the Bay Queen, about crossing our bow.

Q. 62. The barge or the tug? *A*. I mean the tug. I was steering southwest half south.

Q. 63. What course should you say that the tug was steering?

A. It looked to me that she was steering northeast or north northeast.

Q. 64. How was the barge heading? *A.* About north, I should judge.

Q. 65. The barge was heading about north? *A.* She was just off Sabin's.

Q. 66. After you got by the Bay Queen did you give any order to the man at the wheel? If so, what was it? *A.* I told him to starboard the wheel. I saw that there was no earthly chance for me to go to the westward of the tug; he had taken up the whole of the channel.

Q. 67. How wide is the channel there? *A.* It is only about three hundred feet wide. If I could have gone to the westward I would have gone there.

Q. 68. What was the next order you gave, if any? *A.* That is all I did; steadied my wheel, and then I told him to starboard, and of course I went as close to Sabin's Point as I could go to the bank.

Q. 69. You say that you gave an order to starboard. Did you give any other order? *A.* No, sir. Well, I steadied after I said starboard.

Q. 70. Steadied your wheel. Did you give the order hard a-starboard to him? *A.* I did, when I got pretty well down to the lighthouse.

Q. 71. Before the collision you gave an order, did you? *A.* Oh, yes, sir.

Q. 72. How much did your vessel swing under her first starboard helm? *A.* She swung nearly a point, I guess.

Q. 73. How much did she swing under her hard a-starboard helm? *A.* Didn't swing but very little, I suppose; likely about half a point.

Q. 74. Why was that? *A.* Because we was getting up in shoal water.

Q. 75. Near the ground? *A.* We were near the bank.

Q. 76. What order or direction did you give to the engines after you gave the order hard a-starboard, if any? *A.* After I gave the order hard a-starboard, and found that she would not keep off, I found there was going to be a collision, I just stopped her and then backed her full speed.

Q. 77. What order did you give the engines? *A.* Stop her, and then back her full speed; one after the other.

Q. 78. Will you mark on this chart with a pencil the place where you was when you first saw the barge? A. I was hauling round about here. [*Marks the spot* "A" *on the chart.*]

Q. 79. Now tell us where the tug was at the time when you first saw her. [*Marks the spot* "E".]

Q. 80. Mark where the barge was at that time. *A.* [*Marks spot* "D".]

Q. 81. Then, E is the tug and D is the barge when you first saw them, you being at the point A; and B is the tug and C is the barge when the collision occurred? *A.* Yes, sir.

[*Chart put in and marked* "Exhibit B, L. E. Hooper".]

Q. 82. The tug was ahead of the barge, was not she? *A.* Yes, sir.

Q. 83. And she was being towed by a hawser? *A.* Yes, sir.

Q. 84. How long should you say that hawser was? *A.* From the looks of the hawser it seemed to be about a hundred fathoms, to me.

Q. 85. How do you judge? *A.* By the looks of the hawser, the length of the line.

Q. 86. What do you think was the strength of the tide? *A.* About two to three knots.

Q. 87. How fast was your boat going through the water when you first saw the towboat? *A.* About eight knots.

Q. 88. How long was it from the time that you first saw the tow boat until the collision? About how long? *A.* Well, I guess about five minutes.

Q. 89. When you first saw the tug, on which bow did she bear? *A.* A little on the port, pretty much ahead.

Q. 90. And on which hand were you, on her port or her starboard hand? *A.* I was then on her port hand.

Q. 91. When you first saw the tug, did you bear on her port or her starboard side? *A.* On her port.

Mr. **Roelker.** He has already answered that.

A. When I first saw the tug, the tug was coming up, and I was on the starboard.

Q. 92. And she was on your port? *A*. Yes, sir.

Q. 93. On which side of the channel were you when you first saw her? *A*. I was right in the middle of the channel.

Q. 94. On which side of the channel did the collision take place? *A*. On the east.

Q. 95. You say that the first order you gave was to starboard your helm. Why didn't you give the order to port your helm? *A*. Because I could not go that way; the tug was across the channel.

Q. 96. What would have been the effect if you had done that? *A*. I would have had to cut his tow line in two, and the barge would likely have come into me amidships.

Q. 97. Which does good seamanship require, that you should go across the bow or the stern of a vessel? *A*. The stern.

Q. 98. And what was the tendency of starboarding your helm, to go across the bow or across the stern? *A*. Well, I could not go that way, so I starboarded my wheel and went to the eastward, as he had crossed.

Q. 99. Would that have a tendency to bring your vessel across his stern or across his bow? *A*. Well, he was across us at that time; he crossed my bow.

Q. 100. How fast do you think the tug and barge were going at the time you gave the order? *A*. Between five and six knots.

Q. 101. That is through the water? *A*. Through the water.

Q. 102. You say that after you gave the order hard a-starboard, you gave the order to the engine room, full speed astern. How long was that before the collision? *A*. A little over a minute.

Q. 103. And when the barge and the steamer collided, on which bow did you strike him, and on which bow did he strike you? *A*. Struck us on the port, and him on the starboard.

Q. 104. That is, his starboard bow and your port came together? *A*. Yes.

Q. 105. About what angle? Can you show it on a piece of paper?

[*Draws diagram showing angle at which the vessels came together. Put in as* Exhibit X. "Libellant's Exhibit X, L. E. Hooper."]

Q. 106. Was there room for the tug to have gone more to one side or the other of the channel? Could the tug and tow have gone to the east or west of the channel, and if so, which side? *A*. The barge could not go any more to the east of the channel; of course the tug could. The barge had not got far enough to make the turn.

Q. 107. Provided the barge and the towboat had been alongside of each other, would there, in your opinion, have been any collision? *A*. No, sir; the way it ought to have been done.

Q. 108. If the barge had been heading the same course as the tow would there have been any collision? *A*. No, sir.

Q. 109. What was the cause of the collision? *A*. Long hawser.

Q. 110. Provided the tug had signified her intention as to course by whistle, as to whether or not the collision could have been avoided when you first saw her? *A*. When I first saw her? Of course he had a long hawser. If he had blown a whistle I would have answered it.

Q. 112. As to whether or not you were watching the barge. [Mr. Roelker *objects to form of question.*]

Q. 113. Did the tugboat blow any whistle to you? *A*. No, sir; I didn't hear any.

Q. 114. Would you have heard one if one had been blown? [*Objected to by* Mr. Roelker.] *A*. Yes, sir.

Q. 115. Did you blow any whistle to the tug? *A*. No, sir.

Q. 116. On which side of the channel were you when you passed the Bay Queen? *A*. I was right in the middle of the channel.

Q. 117. How wide is the channel in that place? *A*. I should judge it is about three hundred feet.

Q. 118. And you passed to the westward of the Bay Queen? *A*. Yes, sir; passed to the westward.

Q. 119. What was the damage to your vessel occasioned by the collision, if any? *A*. Knocked two holes in her port bow.

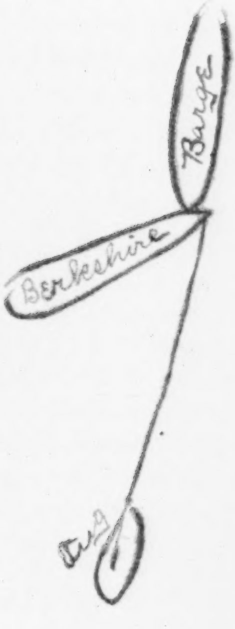
Q. 121. And your vessel turned round and came back to Providence? *A*. Yes, sir.

Q. 122. Did you repair here? *A*. Patched her up.

Q. 123. And proceeded where? *A*. Norfolk.

L. E. Hooper, F.H.

[Put in evidence, page 92.]



Q. 124. Made permanent repairs there? *A.* Patched her up, and made the round trip, and then fixed her up when we got back.

Q. 125. Did you notice the injury to the barge at the time you struck her? *A.* No, sir, I could not see; I was up on the forecastle; I looked down, and it looked like a seam.

Q. 126. How fast were you going when you struck her? *A.* We were about stopped.

Q. 127. How fast do you think the barge and the tug were going at that time? *A.* About five or six knots; somewhere along there.

Cross Examination by Mr. ROELKER.

×-*Q.* 128. Are you still master of the Berkshire? *A.* Yes, sir.

×-*Q.* 129. Been in her every trip she has run since then? *A.* Well, I was master; Captain Ryder was captain of her; I have taken her when he was sick.

×-*Q.* 130. Have you had any other accident since then? [*Objected to by* Mr. CARVER.] *A.* Yes, sir; we had an accident.

×-*Q.* 131. What was that? *A.* A schooner ran into us.

×-*Q.* 132. Oh, another case where you were run into! Didn't you come very near having a collision with another barge the same day as this? *A.* Not on the day the schooner ran into us.

×-*Q.* 133. I mean on the 16th August. *A.* No, sir.

×-*Q.* 134. Will you swear to that? *A.* Yes, sir.

×-*Q.* 135. Or on the same trip, on your return? *A.* No, sir.

×-*Q.* 136. You were in charge of this vessel alone with this man Keine in the pilot house on that day? *A.* Yes, sir.

×-*Q.* 137. You have sworn the wind was southerly.

×-*Q.* 138. You have sworn the wind was southerly that day? *A.* Well, in a river it may be one way, and be quite another way outside. I should judge it was southerly.

×-*Q.* 139. As a matter of fact, was not the wind east or northeast? *A.* It might have been.

×-*Q.* 140. Will you swear it was not? *A.* No, I will not swear to it.

×-*Q.* 141. Then when you said it was southerly you didn't know whether it was or not? *A.* It seemed to me it was about south. I could tell by my log book.

×-*Q.* 142. How do you want to leave it? Was it southerly or easterly or northeasterly? *A.* I can be sure by referring to my log book.

×-*Q.* 143. Never mind about your log book. You didn't need any log book in your examination in chief. *A.* I think it was about southeast.

×-*Q.* 144. You think it was about southeast. As a matter of fact, wasn't it northeast? *A.* No, I think it was southeast.

×-*Q.* 145. You will swear it was not northeast? *A.* I would not swear it was northeast, or was not northeast. I will refer to my log book.

×-*Q.* 146. All these other things that you have sworn to, are you any more certain of them than you are of this thing? *A.* Oh, I am certain of them; but the wind — there was not much anyway; it was light air.

×-*Q.* 147. I ask you, are you any more certain about the other things you have testified to than you are about the direction of the wind? *A.* Yes, sir.

×-*Q.* 148. Which things? *A.* The fact of the collision.

×-*Q.* 149. The fact that a collision occurred you will swear to? *A.* Yes; of course the collision occurred.

×-*Q.* 150. The first time you saw the towboat and barge was about the time the Bay Queen passed you? *A.* I had not taken much notice of it before that. I had not taken notice how far off the barge was until after I passed the Bay Queen.

×-Q. 151. From the time you saw her first until the time of the collision was how long? *A.* About five minutes, I guess.

×-*Q.* 152. You have said there was no way of preventing this accident in view of this long hawser. If you had slowed down your vessel, or stopped her until she had passed you, couldn't it have been prevented? *A.* The tide was running very fast. There was room enough to pass to the eastward —

×-*Q.* 153. If you had stopped your vessel and backed her when you first saw the towboat and barge, could you not have avoided the collision? *A.* I would have thrown my ship out of her course.

×-*Q*. 154. Will you answer my question, please? *A*. I could not have avoided it at that time; no, sir.

×-*Q*. 155. Not when you first saw her? *A*. No, sir; the Petrel was coming up on my stern.

×-*Q*. 156. How far aft was the Petrel? *A*. I don't know how far off.

×-*Q*. 157. Could you see the Petrel from where you were? *A*. She was blowing her whistle.

×-*Q*. 158. If you had backed when you first saw the towboat and barge, would you not have avoided the collision? *A*. It would have thrown my ship out of position. I should have backed to port and thrown my stern out.

×-*Q*. 159. When you first saw this tug and tow how far off was she? *A*. About half a mile; just as I turned Pomham Light.

×-*Q*. 160. That is when you first saw her? *A*. After I passed the Bay Queen is when I first noticed how near she was.

×-*Q*. 161. It took you about five minutes to get down there? *A*. Yes, sir.

×-*Q*. 162. When you first saw her, you have marked upon the chart, she was clear across the channel? *A*. I came round Ponham and saw the tug, and then came the Bay Queen; she gave me one whistle and I answered it, and I ported. Then I looked at the tug and thought to myself, the tug is going to make a turn, and then I just kept to the eastward.

×-*Q*. 163. You saw that she was not going to make a turn? *A*. I saw there was no room for me to pass. A tug going round a point like that has got to proceed some distance in order to get her tow round.

×-*Q*. 164. You saw that this tug had a long hawser when you first noticed her, you say? *A*. Yes, sir.

×-*Q*. 165. Then the longer the hawser, the longer the distance she would have to go over to the westward before she could turn up stream again in order to make her barge clear the Sabin's Point Light, judging from your observation? *A*. She would have to swing over that way.

×-*Q*. 166. You knew that she would have to swing over that way; then why didn't you slow down until she got past? *A.* I thought there was room enough to go to the eastward.

×-*Q.* 167. Then if you hadn't thought there was room enough to go to the eastward, you would have slowed down? *A.* Yes, sir.

×-*Q.* 168. When did you first find out that you could not get by her? *A.* When I got up to Sabin's.

×-*Q.* 169. Do you mean that you were a quarter of a mile off at the time? *A.* A quarter of a mile. When I found that I could not get by.

×-*Q.* 170. How long would it take you to run a quarter of a mile? You were going at full speed, were you not? *A.* No; I at once stopped and backed full speed.

×-*Q.* 171. And you think you were a quarter of a mile off then? *A.* Oh, no; not when I found that I could not pass the barge.

×-*Q.* 172. When you found that you could not pass the barge, how far off was the barge from you? *A.* About two hundred yards.

×-*Q.* 173. It was not until she was within two hundred yards of you that you found you could not pass between the barge and the rocks? *A.* I could not pass, as the barge would have crowded me all the time.

×-*Q.* 174. How far to the westward of Sabin's Point Light was the tug when you saw her before the collision? *A.* Well, she was just about Sabin's Point Light when I first saw her; I suppose she was one hundred and fifty feet to the westward of Sabin's Point.

×-*Q.* 175. And by the time you got up to her she was across the channel about three hundred feet? *A.* Yes, sir.

×-*Q.* 176. If the channel had been six hundred or eight hundred feet, would there not have been ample room for you to go to the westward? *A.* Oh, certainly.

×-*Q.* 177. You think the channel is only three hundred feet wide there? *A.* That is about all.

×-*Q.* 178. And it was going on that supposition that you took the course you did? *A.* Yes, sir; I could not go to the westward.

×-*Q.* 179. You say you gave no signal? *A.* No, sir.

×-*Q.* 180. And you heard no signal? *A.* No, sir.

×-*Q*. 181. There was no other vessel near you? *A*. No, sir; this little Petrel, that was all.

×-*Q*. 182. And she was coming behind you? *A*. She was behind.

×-*Q*. 183. And you don't know how far behind? *A*. No, sir; I didn't see her.

×-*Q*. 184. You differ somewhat from your quartermaster as to the number of orders you gave him? *A*. I gave him the order to starboard; after I got pretty well down to Sabin's I gave him the order to hard a-starboard.

×-*Q*. 185. When did you give him the first order to starboard? *A*. That was just after I passed the Bay Queen, and she responded about a quarter of a point.

×-*Q*. 186. When did you give the next order? *A*. Off Sabin's I gave the order hard a-starboard.

×-*Q*. 187. That didn't produce any effect? *A*. No; she was running right along in shoal water; she wouldn't mind her wheel.

×-*Q*. 188. You say you have been running in and out of Providence for a number of years? *A*. Yes, sir.

×-*Q*. 189. And you have met a number of tugs and tows on hawsers, I presume? *A*. Yes, sir.

×-*Q*. 190. It is the customary way in this harbor? *A*. Well, I have never seen them with such long hawsers; I have seen them at sea.

×-*Q*. 191. What makes you think it was a hundred fathoms long? *A*. From the looks of it.

×-*Q*. 192. When did you first form that estimate of its length? *A*. When I seen it.

×-*Q*. 193. Was that the first time you saw her? *A*. Yes, sir.

×-*Q*. 194. I don't understand that you claim to have made any measurement of it? *A*. That is simply my judgment of it.

Direct Examination resumed by Mr. CARVER.

Take this *de bene*.

Q. 195. You said in cross examination, Captain, that the Berkshire had been in collision with a schooner since this? *A*. Yes, sir.

Q. 196. Were you in charge of a vessel at that time? *A.* Captain Kerrigan was in command of her; I was first officer.

Q. 197. You were first officer on her. Was the ship under your command at the time of the collision? *A.* No, sir; Captain Kerrigan was in command.

Q. 198. Did you or not ring full speed astern as soon as you apprehended any danger of a collision? *A.* I did, sir.

Q. 199. You stated in cross examination that if you had stopped before, when you first saw the barge and her tow, that you would have been thrown out of position? *A.* I would, sir.

Q. 200. Would you not have had command of your ship if you had? *A.* I would not, as the tide was an ebb tide.

Q. 201. How was it setting with reference to your vessel? *A.* Setting right down the channel.

Q. 202. Was there a bend in the stream at that place? *A.* Yes, sir.

Q. 203. How wide was the channel at that place? *A.* Two hundred and fifty or three hundred.

Q. 204. Feet or fathoms? Which is it, feet or fathoms? *A.* Feet.

Q. 205. When you say the channel was two hundred and fifty or three hundred feet wide, for how many feet vessels do you mean? *A.* The Berkshire is two hundred and fifty.

Q. 206. You say that the channel is two hundred and fifty or three hundred feet wide. That means for how much draught of water? *A.* The draught of water of the ship?

Q. 207. Do you understand my question? *A.* I do not.

Q. 208. Well, listen to it. You say that the width of the channel is two hundred and fifty or three hundred feet deep. How deep is it? *A.* About three and a half fathoms.

Q. 209. Is the channel buoyed out? *A.* Yes, sir.

Q. 210. What is the distance between the buoys on each side at the point where the collision occurred? *A.* There aint but two buoys; one near Pomham, and one at Sabin's. They are spar buoys. The one at Sabin's is a red buoy.

Q. 211. When you give the order full speed astern, how does she back? *A.* Always backs aport.

Q. 212. No matter how you put your wheel she always backs aport? *A*. She does; some vessels answer any way you put the wheel.

Q. 213. With regard to backing? *A*. Yes; with regard to backing.

Q. 214. Did your vessel ground about the time of the collision? *A*. She was near the bottom, certainly.

Q. 215. Is that the reason why she would not obey her helm? *A*. That is the reason.

Cross Examination resumed by Mr. Roelker.

×-*Q*. 216. How do you know she was near the bottom? *A*. By the way she was moving along.

×-*Q*. 217. Take any soundings? *A*. No, sir.

×-*Q*. 218. Were you the regular captain of the Berkshire at the time of this collision we are talking about, this 16th of August? *A*. Yes, sir; I was captain then.

×-*Q*. 219. How long had you been captain? *A*. I had been captain, I suppose, off and on then for about six months.

×-*Q*. 220. You were captain off and on? *A*. Well, sometimes Captain Ryder would make trips. He was the regular captain, and I would take his place when he was sick.

×-*Q*. 221. How often did he make trips? *A*. He made three trips within seven months.

×-*Q*. 222. And since then, when he was well, he has been the regular captain? *A*. Yes, sir; when he is well he is the regular captain.

×-*Q*. 223. I want to ask you, after the collision what did you do? *A*. After the collision I turned back; found that I could not proceed to sea.

×-*Q*. 224. But immediately after the collision, when you had struck the barge, did you continue to back your vessel, and which way did she back? *A*. She was backing pretty well straight. She was near the bottom then.

×-*Q*. 225. When she struck the barge which way was your vessel heading? *A*. I was heading then about — I guess about southwest by west.

×-*Q*. 226. Did you continue to back after the collision? *A*. Backed all the time to get clear of the barge; swinging round the way she was, in shoal water, she was backing straight.

×-*Q*. 227. Which way did she head when she was backing? *A*. Straight; about north it was.

×-*Q*. 228. How far did she back from the barge? *A*. Well, she backed, I suppose, half a length.

×-*Q*. 229. About one hundred and twenty or one hundred and thirty feet? *A*. About that, I guess.

×-*Q*. 230. What did you do then? *A*. I backed to turn her; then I went ahead to turn her round to go back to Providence.

×-*Q*. 231. Which way did you head then? *A*. I started to head about southwest by south.

×-*Q*. 232. And you ran by the barge in that direction? *A*. I struck the barge, and that stopped us.

×-*Q*. 234. You think now that you backed one hundred and twenty feet; then you went ahead to pass the barge, leaving the barge on your port hand. Did you go around the stern of the barge? *A*. I could not go round the stern of the barge on account of her being so close to Sabin's.

×-*Q*. 235. You went in front of her, across her bows, and then went back to Providence? *A*. The tide was driving me back.

×-*Q*. 236. As a matter of fact, didn't you back down and come up around the stern of the barge? *A*. I backed to get away from the barge, and got below the barge; then I came up to the westward of the barge.

Direct Examination resumed by MR. CARVER.

Q. 237. When you backed from the barge, how far back did you go? *A*. About fifty feet.

Q. 238. Where was the barge? Which way did she go? *A*. The barge was sunk right there. I suppose she drifted down a little with the tide.

Q. 239. Did you go down the river lower than the barge was? *A*. Yes.

Q. 240. Did you pass the barge? *A*. Yes, sir.

Q. 241. How close to her? *A*. About the ship's width.

Q. 242. At that time was the barge in the same position that she was when she was struck? *A.* Yes, sir; about the same, I should judge; she might have slewed some in towards the lighthouse as she sank.

Q. 243. On which side? *A.* On the east side.

Q. 244. Did you go on the east side or the west side of the barge? *A.* I guess you've all got wrong there. I backed, and then went ahead, and drifted down past where the barge sunk, and then I came up and went round the barge to the westward of the barge, — round the barge.

Q. 245. When you passed the barge you say that you went below the barge? *A.* I drifted down, backing and filling.

Q. 246. When you went down below the barge, was you to the westward of the barge or to the eastward of the barge? *A.* I was to the westward of the barge then.

Q. 247. Then you went to starboard at that time? *A.* Yes.

Q. 248. Did the hawser interfere with you at all? *A.* No, sir.

Q. 249. Why was that? *A.* After I got clear of the barge I suppose it knocked the hawser from the barge.

Q. 250. So that you went practically where the hawser was? *A.* Went practically where the hawser was, just as though there was no hawser there.

Q. 251. When you went down below the barge was your head down stream or your stern down stream? *A.* My stern was drifting down stream.

Q. 252. In other words, your head was pointing north towards Providence, and your stern stream? *A.* Yes, sir.

Q. 253. And you drifted down with the tide? *A.* Yes, sir.

Q. 254. As you passed the barge, on which side of you was the starboard side? Was she on your starboard side or on your port? *A.* She was on our port side, the barge was.

Q. 255. At the time you drifted down past her? *A.* Yes, sir.

Q. 256. You say you went down past her stern first? *A.* No; our stern was going down more than the bow, backing and filling any way I could.

Q. 257. But you said that you went to the westward of the barge in going down stream?

Mr. Roelker. If you will allow me, we might cut this thing short. He has stated exactly what took place. He struck the barge and backed off one hundred and twenty-five feet, turning all the time. Then he drifted down stern foremost until he got below the barge. Then he came up towards Providence on the west side of the barge.

Q. 258. Did you go down on the east side? *A*. I backed her, and went ahead to turn her, and then I drifted down. There was not water enough for me to turn eastward of her.

Q. 259. When you went down below the barge, stern foremost, you went with the barge on one side of you, — which shore was on the other? *A*. The west shore.

Q. 260. Then the shore was on the west side and the barge on the east side? *A*. Yes, sir.

Q. 261. Then did you ever go with the barge on one side, and the east shore on the other side? *A*. Yes; I left the barge on the east side in going past.

Q. 262. But you never had the shore on the east side and the barge on the west side? *A*. No, sir; the barge was on the east side and the shore on the west side.

Cross Examination resumed by Mr. Roelker.

×-*Q*. 263. Then, when you told me you went up on the west side of the barge, that was not true? *A*. I could not go in between the barge and the east shore. You got me kind of mixed up.

×-*Q*. 264. You think this barge sank just about where you struck her? *A*. She might have drifted a little down.

×-*Q*. 265. How much? *A*. A little below the lighthouse. It took her perhaps ten minutes to sink.

×-*Q*. 266. You think she sank pretty near where she struck? *A*. She might have gone ahead a little. Of course we stopped her headway when we struck her.

×-*Q*. 267. And the tide was going out? *A*. Working out.

×-*Q*. 268. And you think she settled down pretty near where she was struck? *A*. Yes, sir; pretty near.

DEPOSITION OF LUTHER E. HOOPER (*Recalled*).

Cross Examination by Mr. ROELKER.

PROVIDENCE, March 10, 1894.

×-*Q*. 269. [*Handing witness chart*, 'Exhibit B, L. E. Hooper.'] Will you examine this chart which you produced the other day on your examination in chief, and which is marked "Exhibit B, L. E. Hooper", and upon which you made certain marks at the request of Mr. Carver, and tell me if this is the chart which you used on board the Berkshire at the time of the accident? *A*. No, sir; it is not the chart which I used at the time of the accident. The chart which we used belonged to Captain Ryder.

×-*Q*. 270. It is the same chart, though? *A*. Yes, sir; they are all the same chart; all Providence charts. They are all pretty much alike.

×-*Q*. 271. Will you tell me, please, what are these lines which I see drawn, running down through the Bay? *A*. Oh, that is only the courses; sometimes they draw them lines for courses.

×-*Q*. 272. These are the courses which you are in the habit of steering? *A*. I didn't draw them myself. This is Captain Kerrigan's chart; he is master of the ship now.

×-*Q*. 273. This is the chart which you use now in navigating this vessel? *A*. No; I never use this chart now. I never use any chart in running Providence River. I can run it without a cart. I know where the best water is. I never take the chart out to run the river by it. It is buoyed out too. I can run the river without a chart.

Mr. ROELKER. That is all.

DEPOSITION OF MOSES B. RICH.

Direct Examination by Mr. GREEN.

PROVIDENCE, March 10, 1894.

Q. 1. What is your full name, please? *A*. Moses B. Rich.

Q. 2. Also your business, if you please? *A*. Steamboating.

Q. 3. How long have you been steamboating? *A*. For the last seventeen years.

Q. 4. Where? *A*. Running coal barges and vessels.

Q. 5. Where? On this river? *A*. Yes, sir; I have run seven years between here and New York.

Q. 6. Are you familiar with the navigation between here and the broad part of Narragansett Bay? *A*. Yes, sir.

Q. 7. And are you also familiar with the locality? *A*. Yes, sir.

Q. 8. The depth of the water and the formation of the channel? *A*. I won't say about the water. I have brought up barges that would draw fifteen feet, most of them, from that down to ten feet.

Q. 9. Were you on the river in the afternoon of Aug. 16, 1893? *A*. Yes, sir.

Q. 10. What were you doing then? *A*. I was running from here to shore places with the Continental.

Q. 11. Were you in command of any steamer? *A*. Yes, sir; the Planet.

Q. 12. How long have you been running the Planet? *A*. Two seasons.

Q. 13. Were you going up or down? *A*. Going down.

Q. 14. In the ordinary course of your business? *A*. Yes, sir.

Q. 15. Did you see this collision between the Berkshire and barge No. 4? *A*. Well, I saw them when they struck.

Q. 16. Did you see them before they struck? *A*. Not but a little while, because I was steering myself, and was looking out for my own boat.

Q. 17. When the steam towboat was going up with this barge, how was the barge towing? Was it alongside or on a hawser? *A*. On a hawser.

Q. 18. How long was the hawser? *A*. I should judge about one hundred fathoms.

Q. 19. Do you think it is prudent and proper, in the vicinity of Bullock's Point in Providence, and Sabin's Point in Providence, to be towing any barge with a hawser so long as that? *A*. Well, we do it.

Q. 20. Do you think it is a proper thing to do in the interests of other people? [*Objected to by* Mr. ROELKER.] *A*. No, I do not. Although I have towed up six barges all strung out, time and time again.

Mr. GREENE. The witness is yours.

Cross Examination by Mr. ROELKER.

×-*Q*. 21. Is there any settled rule of navigation about this matter of towing barges? *A*. No, sir; I don't think there is.

×-*Q*. 22. There is no settled custom among towboats as to towing barges? *A*. No, sir; though most of them tow them the best way to suit themselves.

×-*Q*. 23. It has been, for many years, customary to tow them up on hawsers through the bay? *A*. Yes, sir.

×-*Q*. 24. In Providence River, and other rivers? *A*. Yes, sir; all other rivers I know of along the Atlantic coast.

×-*Q*. 25. There is no custom, practice, rule or regulation among towboats about it? *A*. No, sir.

×-*Q*. 26. When you say you think this hawser was one hundred fathoms long, I don't suppose you mean to swear positively? *A*. No, sir; I just cast my eye over it when I seen them coming up, and thought it was about that long.

×-*Q*. 27. Where were you? *A*. I suppose I was half way from Riverside out to the light.

×-*Q*. 28. Below the light? *A*. Above the light. This side of where they came together.

×-*Q*. 29. How far from the accident? *A*. Half ways from here to Point Street Bridge.

×-*Q*. 30. How far do you call that? *A*. About one sixteenth of a mile, or somewhere along there.

×-*Q*. 31. At what angle from them were you? Were you almost dead ahead of them? *A*. Yes, sir.

×-*Q*. 32. The tug was about dead ahead? *A*. No, the tug was just making the turn.

×-*Q*. 33. Round the lighthouse? *A*. Yes, sir.

×-*Q*. 34. At what angle were they from you? *A*. She was heading about two points, I should say.

×-*Q*. 35. Do you know the length of this barge? *A*. No, sir.

×-*Q*. 36. Suppose you had to tow a barge with eighteen hundred ton of coal, drawing eighteen to twenty feet of water, how short a hawser would you deem it prudent to use? *A.* You could not tow a barge of that size with less than fifty fathoms.

×-*Q.* 37. That is on account of the steering? You could not steer the barge on less? *A.* No, sir.

×-*Q.* 38. If, as a matter of fact, this barge had no more than fifty fathoms, or in that vicinity, that would be as short a line as he could reasonably use? *A.* Yes, sir.

×-*Q.* 39. Would there be any difficulty, in your opinion, in towing a barge of that length, up this river, hitched alongside? *A.* No, sir.

×-*Q.* 40. It is easier to do it with a towelin? *A.* Yes, sir; it is.

×-*Q.* 41. Some difficulty about keeping her pointed straight, isn't there, with one tug? *A.* No, I don't know as there is about that.

×-*Q.* 42. But the boat will steer easier when you are ahead of a barge than where you were alongside of a barge? *A.* Yes, sir; because you would not take so much wheel.

That is all.

DEPOSITION OF RICHARD B. GIBBS.

Direct Examination by MR. GREEN.

Q. 1. Your full name, Captain? *A.* Richard B. Gibbs.

Q. 2. Your business and residence, please? *A.* Captain of the steamer Petrel, Pawtucket.

Q. 3. Are you in the habit of running steamboats up and down Providence River? *A.* Yes, sir.

Q. 4. For how long? *A.* Twenty-three years.

Q. 5. The steamer Petrel runs from where? *A.* Pawtucket to Bullock's Point.

Q. 6. Were you running it last summer? *A.* Yes, sir.

Q. 7. Were you in the neighborhood of Sabin's Point and Bullock's Point Aug. 16, 1893? *A.* Yes, sir.

Q. 8. What was the weather then? *A.* Pleasant; moderate.

Q. 9. How was the wind? *A.* I think the wind was about east. There was not any wind to speak of.

Q. 10. Were there any steamers about there in the neighborhood? *A*. The Berkshire and the Planet and the Bay Queen.

Q. 11. Did you see the Petrel there? *A*. Yes, sir.

Q. 12. The Minneola? *A*. I didn't notice the Minneola. She had passed me.

Q. 13. Were you going up or down? *A*. Going down.

Q. 14. Did you exchange whistles with the Bay Queen? *A*. Yes, sir.

Q. 15. Did you hear any signals between the Bay Queen and the Berkshire? *A*. Yes, sir.

Q. 16. Which way was the Bay Queen going, up or down? *A*. Going up the river.

Q. 17. Where were you at this time? *A*. I was alongside the Berkshire.

Q. 18. Were you in the pilot house or on deck? *A*. I was in the pilot house.

Q. 19. Can you state what the course of the Berkshire was then? *A*. No, sir. She was heading about southwest, I think.

Q. 20. Can you state the course of the towboat and barge at that time? *A*. I think she was heading about north.

Q. 21. Did you see the towboat change her course? *A*. Yes; after she got by the light she changed her course.

Q. 22. What was the effect of this change of course on the position of the barge? *A*. Well, the barge didn't change. The barge was heading right up the river after the towboat turned.

Q. 23. Was the barge in the middle of the channel or on one side? *A*. I should say she was pretty near the middle. A little to the eastward, if anything.

Q. 24. Where did the towboat seem to change its course? *A*. She changed her course going round the light near Sabin's.

Q. 25. Did you hear any whistles given by the tugboat to the Berkshire, or any signals exchanged between them? *A*. No, sir.

Q. 26. In your judgment, after the Berkshire passed the Bay Queen. Which you have just spoken of, would it have been prudent for the Berkshire to change her course and cross the towboat's bow so as to allow the towboat to pass to port? *A*. I don't think it would.

Q. 27. Did you notice the length of this tow line? *A*. I should think the tow line was about fifty feet longer than the Berkshire.

Q. 28. Do you think it is a safe thing for river traffic, for a tow, boat towing a barge such as this barge was, through a channel like that off Sabin's Point, to use so long a hawser? *A*. No, sir; I do not.

Cross Examination by Mr. Roelker.

×-*Q*. 29. I suppose, Captain, that you were paying attention to your own boat? *A*. Yes, sir.

×-*Q*. 30. You had quite a number of passengers on board? *A*. Had two hundred and nine.

×-*Q*. 31. And you had all you could attend to, to take care of your own craft? *A*. Yes, sir.

×-*Q*. 32. Were you paying any special attention to signals between the Berkshire and the tow? *A*. I just heard her blow, that was all. We were running down like that. I was here and the Berkshire here, and the Berkshire blowed one whistle and I answered it, and the Bay Queen came right between us.

×-*Q*. 33. But I say you were not paying any attention to the signals between the Berkshire and the towboat. *A*. No, sir; I was not paying any attention to them.

×-*Q*. 34. So they might possibly have blown and you not heard it? *A*. They might possibly have blown.

×-*Q*. 35. You think the tow line was about fifty feet longer than the Berkshire? *A*. Yes, sir.

×-*Q*. 36. Do you know how long the Berkshire is? *A*. No, sir.

×-*Q*. 37. Have you had any experience in towing? *A*. Ran a towboat about twelve years.

×-*Q*. 38. Where was that? *A*. Here in this river.

×-*Q*. 39. Supposing the Berkshire to have been two hundred and sixty feet long, and the tow line was fifty feet longer than that, that would be three hundred and ten feet, about fifty fathoms? *A*. Somewhere in that neighborhood.

×-*Q*. 40. Do you think it would have been prudent for a tug to tow a barge of that size, with eighteen hundred tons of coal and drawing twenty feet of water, with any shorter line than fifty feet? *A*. Yes, sir; she could tow her alongside as well.

×-*Q*. 41. Don't you think it would interfere with the steerage? *A*. No, sir; the boat could go right up alongside and steer a barge better.

×-*Q*. 42. You mean to have that put down as your deliberate judgment here? *A*. I do; in a narrow place I do. That is done every day right in the Pawtucket River.

×-*Q*. 43. This towing on lines is carried on every day? *A*. Yes, sir; it is easier for a boat to tow, and it will go faster.

×-*Q*. 44. There is no rule or regulation or practice either way? *A*. Never heard of any.

×-*Q*. 45. It is simply that you think it is more convenient for other boats to tow alongside? *A*. That's what's the matter.

×-*Q*. 46. That is what brought you in here, to say that? *A*. Not only that. That barge could be towed within ten feet of the tug.

×-*Q*. 47. How much water in the Pawtucket River? *A*. Ten feet.

×-*Q*. 48. Do you think that the size of the barge has anything to do with the difficulty of towing it on that length of line? *A*. Of course it has some.

×-*Q*. 49. The larger the barge the greater the difficulty would be in towing her that way? *A*. Yes, sir.

×-*Q*. 50. Therefore you might take a small barge up through the Pawtucket on a short hawser, where you could not take a big one? *A*. You could not take it on a long one.

DEPOSITION OF JOSEPH H. SPOONER.

Direct Examination by Mr. GREEN.

Q. 1. Where do you live, sir? *A*. 317 Plain Street.

Q. 2. In Providence? *A*. Yes, sir.

Q. 3. Your business, please? *A*. Master of steamers.

Q. 4. How long have you been in that business? *A*. About twenty years.

Q. 5. Are you a pilot? *A*. Yes, sir.

Q. 6. What steamer were you running last summer? *A*. Steamer Bay Queen.

Q. 7. Of the Continental Line? *A.* Continental Line.

Q. 8. Were you in the river, in the neighborhood of Sabin's and Bullock's Point, on the afternoon of Aug. 16, 1893? *A.* Yes, sir.

Q. 9. Did you see this collision between the Berkshire and barge No. 4? *A.* No, sir.

Q. 10. What was the weather? *A.* Fine, clear.

Q. 11. How was the wind? *A.* I think it was southeast; won't be positive. Very light air.

Q. 12. That afternoon when you were going up towards Providence, were you ahead or astern of this tug and barge? *A.* Ahead of her.

Q. 13. Did you see the tow line which connected the two? *A.* Yes, sir; I seen it.

Q. 14. What was the length of it? *A.* I should think it was over two hundred feet.

Q. 15. How is the channel in that place where this collision took place? *A.* It is a very bad and narrow place to get a steamer round, or a tow especially. I think it is the worst place we have there in the Bay.

Q. 16. Did you pass the Berkshire coming down? *A.* No, sir; I met her.

Q. 17. You were going up and the Berkshire coming down, and you passed one another? *A.* We met.

Q. 18. Did the towboat and the barge together take up the width of the channel? [*Objected to by* Mr. ROELKER.] *A.* I think it did; yes, sir.

Q. 19. Do you consider it, from your experience and knowledge as a pilot of this Narragansett Bay, and in that part of it known as Providence River, a prudent thing for river traffic, for a towboat in towing such a barge in such a channel, to use so long a hawser? *A.* I think it is very imprudent.

Cross Examination by Mr. ROELKER.

×-*Q.* 20. You were captain of the Bay Queen, as I understand it? *A.* Yes, sir.

×-*Q.* 21. And you passed the tug and tow somewhere down the river? *A.* Yes, sir; when I was coming out of Bullock's Point I came out ahead of her.

×-*Q.* 22. And after that you kept ahead of her all the time? *A.* Yes, sir.

×-*Q.* 23. You didn't see the accident? *A.* No, sir.

×-*Q.* 24. When, therefore, you say that the tug and tow took up the whole channel, you don't know actually whether they did so or not? *A.* I know that with that length of tow line they could not get round the Point without taking up the whole channel. It takes up the whole channel when they come up there with a long line. I have seen lots of them before.

×-*Q.* 25. Where did you pass the steamer Berkshire? *A.* I didn't pass her; I met her.

×-*Q.* 26. Where did you meet her, if you like it better? *A.* About half way trom Sabin's Light to the black buoy.

×-*Q.* 27. You exchanged signals with her? *A.* Yes, sir.

×-*Q.* 28. Did you hear any other whistle after that? *A.* Yes.

×-*Q.* 29. That was behind you? *A.* Behind me.

×-*Q.* 30. Please describe that whistle. *A.* I can't describe it; didn't pay any special attention to it.

×-*Q.* 31. Was it a short blast or a long one? *A.* It was a long one.

×-*Q.* 32. One long whistle? *A.* Yes, sir.

×-*Q.* 33. Where were you in the channel when you met the Berkshire? *A.* On the southeast side.

×-*Q.* 34. And the Berkshire was where? *A.* Northwest of me.

×-*Q.* 35. Whereabouts was she with reference to the width of the channel? *A.* She was on the west side of the channel.

×-*Q.* 36. Was she pretty near the middle of it? *A.* Well, no; not exactly; she was coming down to the westward of me, and I going up to the eastward.

×-*Q.* 37. And you think that at that time she was a little to the westward of the middle of the channel? *A.* Yes, sir; she was on the west side of the channel.

×-*Q.* 38. How long have you travelled in this river? *A.* About two years.

×-*Q*. 39. During the whole of that time, these tugs have been coming up and going down in this way? *A*. They have not been going on such long lines.

×-*Q*. 40. It has been done ever since they commenced bringing them here? *A*. Yes, sir.

×-*Q*. 41. That is the customary way? *A*. Yes, sir.

×-*Q*. 42. There is no law, or rule, or regulation in regard to it? *A*. Not that I know of; still there might be.

×-*Q*. 43. Have you ever know of any accident here before? *A*. Well, yes; I have heard of an accident, off Pequot, I think, where a steamer ran into the stern of a barge. It seems to me that was somewhere between Pomham and Fuller's.

×-*Q*. 44. Do you know the number of barges that come up here on tows? *A*. No, sir.

×-*Q*. 45. Can you give us an estimate? *A*. I should think it would average twenty-five or thirty a week.

×-*Q*. 46. No more than that? *A*. Well, I could not say. Never thought much about it.

×-*Q*. 47. Well, they are pretty thick, aren't they? *A*. Yes, sir; very thick.

×-*Q*. 48. Has your experience in steamboating been confined to this river? *A*. Mostly, yes.

×-*Q*. 49. Do you know anything about the custom of towing in other ports, bays and rivers, ~~along the~~ coast. [*Objected to by* Mr. GREEN *on the ground of immateriality*.]

×-*Q*. 50. As a matter of fact, don't you know that it is the custom — the uniform custom everywhere along the coast of the United States, to tow barges in that way? [*Objected to by* Mr. GREEN.] *A*. I don't know as I do know, sir.

DEPOSITION OF HORACE M. CARR.

Direct Examination by Mr. GREEN.

Q. 1. Where do you live? *A*. I live on Broad Street, Providence.

Q. 2. What is your business? *A*. Now?

Q. 3. Yes. *A.* Well, I have been engaged in the jewelry business this winter.

Q. 4. What was your business last summer? *A.* On a steamboat.

Q. 5. How long have you been connected with steamboats? *A.* Well, I have been boating more or less all my life.

Q. 6. Are you a pilot? *A.* Yes, sir.

Q. 7. Of this Narragansett Bay? *A.* Yes, sir.

Q. 8. How long have you been so? *A.* I worked for the Continental Line fourteen seasons.

Q. 9. What steamer were you in charge of last summer in August? *A.* I was in two or three different boats last summer.

Q. 10. On the 16th of August did you have charge of the Minneola? *A.* Yes, sir.

Q. 11. Where were you about three o'clock in the afternoon of the 16th of August last year? *A.* I was just about Sabin's, a little northeast of the Sabin Light.

Q. 12. In charge of the Minneola? *A.* Yes, sir.

Q. 13. Captain? *A.* Yes, sir.

Q. 14. Which way were you going? *A.* Up the river; bound to Providence.

Q. 15. How was the weather? *A.* Clear; a little light air to the eastward.

Q. 16. What steamers did you see in the vicinity, near Pawtuxet black buoy? *A.* I met the Petrel and Planet and the Berkshire.

Q. 17. They were going down the river? *A.* The Berkshire was off just to the eastward of Pawtuxet black buoy, and the Petrel and the Planet were just ahead of her.

Q. 18. Did you see the Bay Queen? *A.* The Bay Queen was astern of me. When I looked out of the pilot house astern I could see her.

Q. 19. Did you see any towboat and barge in that vicinity? *A.* Yes, sir.

Q. 20. Do you know what the towboat and barge were? *A.* What do you mean?

Q. 21. Was the towboat one belonging to the Norfolk & Western Railroad Company? *A.* Yes, sir.

Q. 22. And the barge was barge No. 4? *A.* Yes, sir.

Q. 23. Whereabouts on your steamer were you at this time? *A.* I was in the pilot house, and I stepped to the door and looked out.

Q. 24. Did you see the Berkshire attempt to pass this tug and barge? *A.* I saw her coming down, and saw her before she passed the tow.

Q. 25. Did you see the collision? *A.* Saw some of it; yes, sir.

Q. 26. How far were you at the time of the collision from the place where the collision happened? *A.* Well, I should judge — I don't know the distance — probably an eighth of a mile.

Q. 27. Did you hear signals exchanged between the Berkshire and the towboat? *A.* No, sir.

Q. 28. At that distance would you naturally have heard them or not? *A.* I think I would; yes, sir.

Q. 29. Before this collision was there any change in the course of either towboat or barge?

Mr. Roelker. That you saw.

A. Well it looked to me then, from where I was — I stood in my pilot house door looking aft — they was both making the turn; it looked to me as if the Berkshire was just making the turn inside the towboat to come down past Sabin's Light.

Q. 30. After the Berkshire passed the Bay Queen, would it, in your opinion as a navigator, have been prudent to make a sheer to the west to go round the towboat and the barge? *A.* No, sir; not where he was then. It would be a pretty rank sheer. I would not want to try it with a tugboat like that.

Q. 31. How long was the towing line between this towboat and the barge? *A.* I don't know; I should judge it was five hundred feet, — should think it was seventy-five fathoms or more.

Q. 32. In such a channel and in such a place as this collision which you saw, occurred, do you, as a navigator, from your familiarity with the locality, and your experience, think it is a prudent thing for other vessels, for a towboat to be towing such a barge with so long a line? *A.* Well, no; I don't think they ought to use such a long line.

Q. 33. I understood you to say this Minneola was one of the boats of the Continental Company? *A.* Yes, sir.

Q. 34. Are you personally acquainted, or were you at that time, personally acquainted, with the officers of the Berkshire? *A.* No, sir.

Q. 35. Or the officers of the towboat and barge that you have spoken of? *A.* No, sir; don't know any of them; never saw them in my life, that I know of.

Cross Examination by Mr. Roelker.

×-*Q.* 36. How long have you been captain of the Minneola? *A.* Well, I was on and off three or four times; we took turns last summer running boats here.

×-*Q.* 37. How long have you been captain of these steamboats? *A.* Fourteen years, or fourteen seasons.

×-*Q.* 38. Captain all the time? *A.* Yes, sir.

×-*Q.* 39. The Minneola is a small boat, if I remember right? *A.* Yes, sir; I was on that day, while the other man was asleep. I was running for him.

×-*Q.* 40. You have been running all these small boats for them? *A.* Have run most of the boats they own. I used to go as quartermaster from here to New York, and from Bridgeport to New York.

×-*Q.* 41. Have you ever run a towboat? *A.* Not as master of her; been on one considerable, but not to run one.

×-*Q.* 42. You say that you were ahead of this barge coming up the river? She was behind you, and you were heading up towards Providence? *A.* Yes, sir; I came out from Riverside ahead of them, and passed on and left them behind me.

×-*Q.* 43. What you saw of them after you passed them was when you stepped out of your pilot house and looked back? *A.* Yes, sir.

×-*Q.* 44. What made you look out? *A.* I knew there was three boats coming up; I was well in to the eastward; I knew this towboat was coming up, and I looked to see how they were coming out.

×-*Q*. 45. At the time you looked out of your pilot house door, where was the tug and tow with reference to the light? *A*. The tow was the whole length of the hawser to the northward of Sabin's Light, and I should judge the barge was a little to the southward of the light.

×-*Q*. 46. A little to the southward? *A*. I should think it was.

×-*Q*. 47. How close was he to the light? I mean the red buoy outside of Sabin's light. How close was he to the buoy? *A*. I could not say, from where I stood.

×-*Q*. 48. As near as you can tell? *A*. He seemed to be within two hundred or three hundred feet.

×-*Q*. 49. About how near, according to your best judgment? *A*. I was not in a position where I could tell anything about that. I could show you if I had a piece of paper.

Mr. Roelker. Well, draw it out.

[*Witness draws diagram* Exhibit 1, *marked* "H. N. Carr, Exhibit 1".]

×-*Q*. 50. You have now upon this plan drawn it as near as you can, to show how it looked to you when you looked out of the pilot house door? *A*. Yes, sir.

×-*Q*. 51. How long did you stand there? Well, I could stand there two or three minutes.

×-*Q*. 52. Did you see the collision? *A*. I didn't see them when they struck.

×-*Q*. 53. What did you do then? Went back into the pilot house? *A*. I didn't go out of the pilot house; I stood in the door. I was looking to see where my own boat was going.

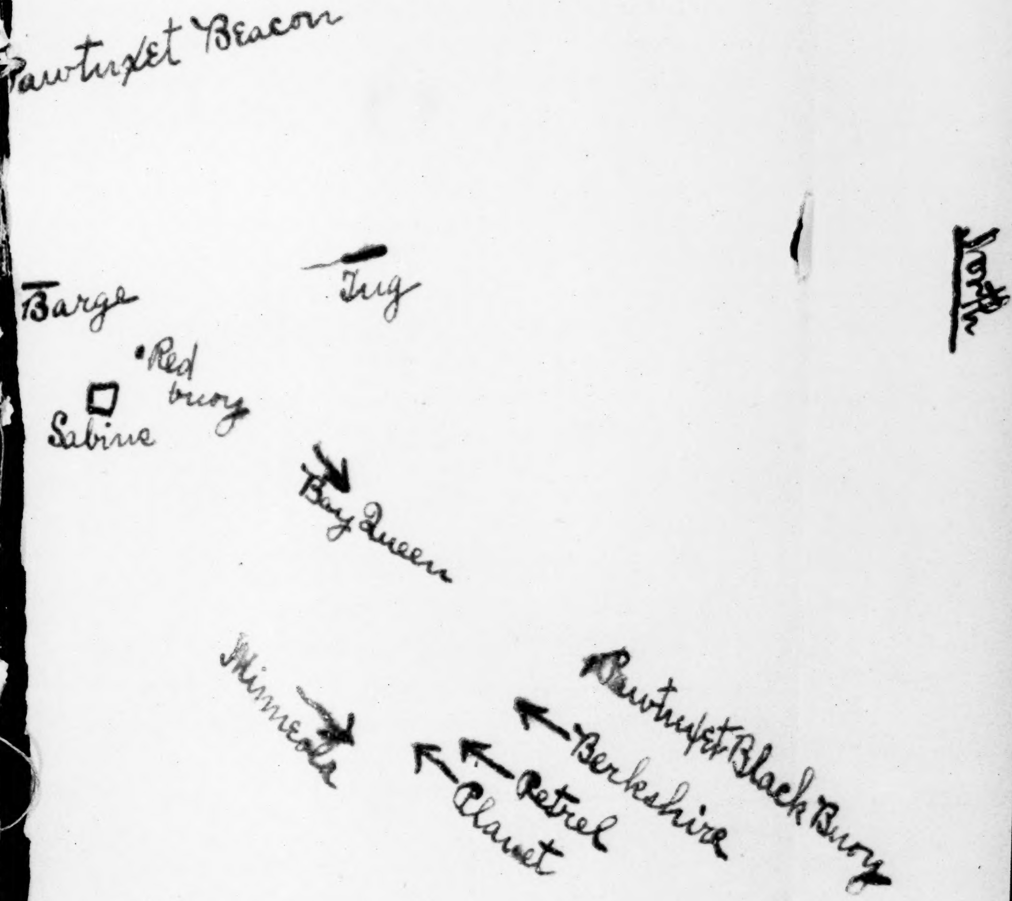
×-*Q*. 54. Did you see the Bay Queen pass the Berkshire? *A*. Yes, sir.

×-*Q*. 55. On which side was the Berkshire then? *A*. In the middle of the channel, just past the Black Buoy.

×-*Q*. 56. Is there anything to obstruct the view from Pawtuxet black buoy down to where this tug and barge were? *A*. No, sir.

×-*Q*. 57. The people in the Berkshire could have seen the people in the barge at the same time you did? *A*. Yes, sir.

Exhibit 1, H. M. Carr.
[Put in Evidence, page 116.]



×-*Q*. 58. What is the distance from the Pawtuxet black buoy to Sabin's Point Light? *A*. Could not tell.

×-*Q*. 59. Can't you tell from your knowledge of the river? *A*. Probably an eighth of a mile or a little more.

×-*Q*. 60. Is not it a quarter of a mile? *A*. I don't know but it is a quarter of a mile.

×-*Q*. 61. Is not it nearer half a mile? *A*. It might be half a mile; I don't know the exact distance.

×-*Q*. 62. Did you see the Bay Queen and Berkshire pass each other? *A*. I know they passed each other.

×-*Q*. 63. Did you see them? *A*. I saw the Bay Queen going up and the Berkshire coming down.

×-*Q*. 64. I asked if you actually saw them meet. *A*. I cannot remember as to that. I know I heard them blow a whistle.

×-*Q*. 65. Didn't they, as a matter of fact, pass at that black buoy or very near to it? *A*. Well, they was to the southward and westward of it; they were not right at the buoy.

×-*Q*. 66. But pretty close to it? *A*. Yes.

×-*Q*. 67. You say it is an imprudent thing for tugs to come up here with barges attached? *A*. Yes, sir.

×-*Q*. 68. They do it here every day, don't they? *A*. Yes, sir.

×-*Q*. 69. Is not that the regular custom? *A*. No, sir; some of them make up the tow down off Bullock's Point.

×-*Q*. 70. Don't they, as a matter of fact, do that all the time? *A*. Well, sometimes.

×-*Q*. 71. Don't they do it more often than not? *A*. Some of them do and some do not. Some make up the tow down the river.

×-*Q*. 72. Is there any rule or regulation in regard to it? *A*. Not as I know of.

×-*Q*. 73. Is not it the custom in every port you have been in? [*Objected to by* Mr. GREEN.] *A*. I have seen them towing on hawsers everywhere.

×-*Q*. 74. Do you know of any other accident that happened in this river of the same kind? *A*. I guess every one in the city remembers when that little steam launch was capsized on the river down here. Came out from Riverside, wasn't it?

Mr. ROELKER. I don't know, I am sure. It is you who are telling it. *A.* Well, I think it was Riverside, or somewhere down there.

×-*Q.* 74. Is that the only case you remember of? *A.* All I know of is what I have seen in the papers.

×-*Q.* 76. You don't know of your knowledge? *A.* No, sir.

×-*Q.* 77. Do you remember the name of that launch? *A.* I think it was a little Pawtucket launch; I don't know the name.

×-*Q.* 78. Of your own knowledge, either here or anywhere else, have you ever known of an accident happening from that cause? *A.* I don't know of any.

Mr. ROELKER. That is all.

DEPOSITION OF PRENTISS O. HOOPER.

Direct Examination by Mr. GREEN.

Q. 1. Do you live in Providence, Mr. Hooper? *A.* I do.

Q. 2. Were you port warden of the port of Providence in August of last year? *A.* Yes, sir.

Q. 3. Were you called upon to make a survey of the accident that occurred to the steamer Berkshire last summer? *A.* Yes, sir.

Q. 4. Will you kindly look at that paper and see if that is the survey you made? [*Hands him paper.*] *A.* [*Examining paper.*] Yes, sir.

Q. 5. Did you subsequently make another survey? *A.* Afterwards; yes, sir.

Q. 6. After the steamer made another voyage? Have you copies of the other two surveys? *A.* Here is one.

Q. 7. Have you the later one?

Mr. ROELKER. I don't see why this is necessary. There is no question that you were somewhat injured; so were we.

Q. 8. Have you another copy? *A.* I have it here.

[*Copies of surveys put in as* Exhibits A, Prentiss O. Hooper; Exhibit B, Prentiss O. Hooper; Exhibit C, Prentiss O. Hooper.]

DEPOSITION OF JOHN E. NEVIL.

Direct Examination by Mr. Carver.

Providence, March 15, 1894.

Q. 1. What is your occupation, Mr. Nevil? *A*. I follow the shore.

Q. 2. Where do you live? *A*. South Providence.

Q. 3. Do you remember the day of the collision between the Berkshire and this barge in August last? *A*. I do.

Q. 4. Where were you? *A*. I was at Sabin's Point waiting for the tide to fall, to go clamming.

Q. 5. How far from the place of the collision? *A*. Perhaps one hundred and fifty yards; cannot tell exactly. As near as I can recollect.

Q. 6. Did you notice the tug and the barge as they came up the river? *A*. I did, yes; because we did not have anything else to do particularly.

Q. 7. Who was there with you? *A*. Mr. Cornell.

Q. 8. Did you notice anything about the length of the tow? *A*. I did; I noticed that it was an extra long one, I thought.

Q. 9. How far should you judge it was between the tug and the barge? *A*. I should judge it was a hundred fathoms, from that to one hundred and twenty-five; one hundred, or something like that.

Q. 10. Were you doing anything at the time of the collision? *A*. No, sir; just going to get ready to go clamming.

Q. 11. Did you notice the Berkshire as she came down? *A*. I did.

Q. 12. Did you hear any whistles from these vessels? *A*. Well, I heard her blow.

Q. 13. Which one? *A*. The Berkshire, and I think one of the river boats answered, the Bay Queen, or some of them.

Q. 14. Did you hear any whistle from the tug? *A*. No.

Q. 15. How was the tug and barge with reference to the channel at the time of the collision and just before? *A*. Well, I should think the barge was taking up a good deal of the channel, the biggest part of it, I should think. Of course it is a very narrow place through there. Us fishermen know, because we have eeled out there.

Q. 16. How wide was the channel there for a vessel drawing fifteen feet? *A.* I should think, through the widest of it, it would not be over one hundred fathoms wide.

Q. 17. I will ask you as to whether or not before the collision you saw any attempt on the part of the Berkshire to stop. *A.* Well, I thought she slowed up. It was a question which was going the fastest, her or the barge.

Q. 18. Have you ever noticed tows going up the river? *A.* Lots, yes.

Q. 19. How is it customary with regard to tows going up the river, with regard to the length of the hawser? *A.* They generally shorten up down below, some at Conimicut and some at Bullock's Point, because there is deeper water.

Q. 20. Do tugs ever go alongside the tows? *A.* Yes, often; only yesterday I saw four barges go up, two on each side.

Q. 21. Was there any room for the Berkshire to go on the east side of the channel? *A.* No, sir. Not drawing twelve or fifteen feet of water.

Q. 22. How about going on the west side? *A.* I should have thought she would have fetched up there.

Q. 23. What, in your opinion, was the cause of the collision? *A.* Well, I could hardly tell.

Q. 24. How was the tide at the time? *A.* The tide was falling; two thirds down.

Q. 25. How does it run there? *A.* It runs pretty hard.

Q. 26. About how many knots an hour? *A.* That I could not exactly tell; it runs quite strong there. There was quite good tides there that time, and of course it runs hard. Sometimes it don't run hard. One thing always looked funny to me about it, why the tug never went alongside to try and get her in shoal water.

Q. 27. That was after the collision? *A.* Yes; she must have been twenty minutes to half an hour sinking.

Q. 28. Did the barge change her position any after she was struck? *A.* Yes; oh, yes. She must have went back two hundred or three hundred feet, sure.

Q. 29. Drifted with the tide? *A*. Yes.

Q. 30. Do you think there was room for the Berkshire to go on either side of the barge and the tow, with the water she drew? *A*. No, or she would have gone aground. She would surely have gone aground on the east side, no question about about that, I should think.

Q. 31. You say it was hard to tell which was going the fastest, the barge or the Berkshire; do you mean past the point where you were? *A*. I mean she was going up the river, and the steamer was going down, and I have wondered ever since which was going the fastest.

Q. 32. Which was passing you the fastest? *A*. Yes.

Q. 33. You were just about abreast of the collision? *A*. Just about as near abreast of the collision as could be.

Cross Examination by Mr. Roelker.

×-*Q*. 34. Mr. Nevil, you say you were at Sabin's Point? *A*. At Sabin's Point.

×-*Q*. 35. How near to the light were you? *A*. Well, one hundred and fifty yards, something like that.

×-*Q*. 36. Which way? *A*. To the eastward.

×-*Q*. 37. Of the lighthouse? *A*. Yes, sir.

×-*Q*. 38. And to the northward of it? *A*. No; to the eastward.

×-*Q*. 39. And what were you doing? *A*. I was getting ready to go clamming.

×-*Q*. 40. Were you on the shore then? *A*. No; I was in the boat.

×-*Q*. 41. Who was with you? *A*. Mr. Cornell.

×-*Q*. 42. Who else was with you? *A*. That is all that was in the boat with us.

×-*Q*. 43. Was there anybody else about there? *A*. There was the fellow that watches oyster beds.

×-*Q*. 44. McLauchlan? *A*. Yes, that is his name.

×-*Q*. 45. How far off was he? *A*. Not a great ways. He was in shore a little ways from us.

×-*Q*. 46. He was just in shore from you? *A*. Just a little.

×-*Q.* 47. Did he have anybody with him? *A.* No.

×-*Q.* 48. Who had you been talking with about that time? *A.* What is that?

×-*Q.* 49. Who had you been talking with? *A.* Only with Mr. Cornell.

×-*Q.* 50. Nobody else? *A.* Didn't talk to nobody else, no.

×-*Q.* 51. Whereabouts did the collision take place? Just about abreast of you? *A.* Just about abreast.

×-*Q.* 52. And you don't know which boat was going the fastest at that time? *A.* No, sir.

×-*Q.* 53. You think that both of them had slowed up? *A.* Well, yes.

×-*Q.* 54. Did you notice the Berkshire take a turn to starboard just before the collision? *A.* No, I don't know as I did.

×-*Q.* 55. You didn't observe that? *A.* No.

×-*Q.* 56. How far from you was the barge when the collision occurred? *A.* Oh, about one hundred and fifty yards, something like that.

×-*Q.* 57. In which direction? *A.* About east.

×-*Q.* 58. She was east from you? *A.* I was east from her.

×-*Q.* 59. She was one hundred and fifty yards to the westward from you? *A.* Yes, sir.

×-*Q.* 60. That is where the collision occurred? *A.* Yes, sir.

×-*Q.* 61. And you are quite sure that the Berkshire could not have passed to the eastward safely? *A.* Well, she would have gone aground.

×-*Q.* 62. You don't mean to say that you are perfectly sure that she could not have passed to the westward of her? *A.* That I could not tell.

×-*Q.* 63. Do you mean to say that you have given exactly the measurement of that channel, or is that only your estimate? *A.* I am only guessing it.

×-*Q.* 64. That is just your guess? *A.* Yes.

×-*Q.* 65. Just what the width is you would not undertake to say? *A.* No, sir; sometimes see a barge or a schooner ashore there; it must be pretty narrow.

Mr. ROELKER. That is all.

DEPOSITION OF SIDNEY CORNELL.

Direct Examination by Mr. Carver.

Q. 1. How old are you, and where do you live? What is your occupation? *A*. I am twenty-seven years old; fisherman.

Q. 2. And you reside where? *A*. Pawtuxet.

Q. 3. Do you remember the collision during last August between the Berkshire and the barge of the Norfolk & Western Railroad Company? *A*. I remember the collision; yes, sir.

Q. 4. Where were you at the time? *A*. I was on Sabin's Point.

Q. 5. What were you doing? *A*. I was waiting for the tide, to go clamming.

Q. 6. Anybody with you? *A*. Mr. Nevil.

Q. 7. Where were you? *A*. Aboard the boat.

Q. 8. How far from where the collision occurred? *A*. About two hundred yards.

Q. 9. Did you notice the barge and the tug as they came up? *A*. Yes, sir.

Q. 10. Did you notice anything with regard to the hawser that connected them? *A*. I noticed it was an exceptionally long hawser.

Q. 11. How long should you say? *A*. That is a hard question to answer. Something about one hundred fathom, six hundred feet.

Q. 12. Have you been accustomed to see barges go up and down there? *A*. Yes, sir.

Q. 13. How did it compare with the usual length of lines? *A*. I think it was an exceptionally long one.

Q. 14. How do tugs and barges usually go up by Sabin's Point? *A*. That I could not answer.

Q. 15. Are you acquainted with the channel at all there? *A*. In some respects, yes.

Q. 16. Are you acquainted with how wide it is? *A*. No; could not answer exactly.

Q. 17. About how long? *A*. I know it is quite narrow there, but how long I could not say, or how wide.

Q. 18. Have you been on the river very much? *A.* Most of my life.

Q. 19. Did you notice anything done by the Berkshire before the collision? *A.* I noticed that she tried to stop.

Q. 20. How were the tug and barge with reference to the channel at the time of the collision? *A.* I should say they were well on the east side of the channel.

Q. 21. On the east side? Was the tug on the east side? *A.* There is a point makes out there, and the tug was making out to westward round that point; that left the barge more to the eastward than what the tug was.

Q. 22. Did you notice any whistles from either the tug or the Berkshire? *A.* Well, I noticed they blowed, but there was so many there that I could not give any evidence at all upon the whistles.

Q. 23. How was the tug and barge with reference to the channel? Heading up stream or across? *A.* The tug was heading, I should say, nearly in a northwest direction. That would bring it partly across the channel.

Q. 24. How was the barge heading? *A.* She was more to the eastward.

Q. 25. How was she heading? Was she heading more to the eastward? *A.* No, I should not say she was. I should say she was heading nearly in the same direction as the tug.

Q. 26. Was there anything you could see that the Berkshire could have done to prevent this collision? *A.* I should say she had to either go ashore, cross the line, or strike the barge.

Q. 27. Did you state about how wide that channel was for a fifteen-foot ship? *A.* No, I could not say.

Cross Examination by Mr. ROELKER.

×-*Q.* 28. Mr. Corneil, you were in back there, close to the oyster beds, I suppose? *A.* Yes.

×-*Q.* 29. How close to the shore? *A.* How close was I to the shore?

×-*Q.* 30. Yes. *A.* Well, somewhat further than what I was from the barge.

×-*Q*. 31. You were about midway from the shore to the barge? *A*. Nearly east of the furthest point that makes out.

×-*Q*. 32. Then, when you looked at this line you saw it endwise? *A*. No, nearly opposite.

×-*Q*. 33. The barge, you say, was well to the eastward of the channel, and the tug was rounding the point? *A*. The tug was past the red buoy and the barge would be nearly there.

×-*Q*. 34. The tug had just rounded the red buoy, and she was not so close to the eastern side of the channel as the barge was? *A*. No.

×-*Q*. 35. But the barge was steering right along close upon her? *A*. Yes, sir.

×-*Q*. 36. Both heading in the same direction? *A*. Nearly so.

×-*Q*. 37. Then you say that you noticed that the steamer Berkshire tried to stop? *A*. Yes, sir.

×-*Q*. 38. Did you notice that as she tried to stop, her head swung round to the westward? *A*. No, I could not say.

×-*Q*. 39. Could not say as to that? *A*. No, sir.

×-*Q*. 40. Can you tell me where the Berkshire was when the tug first rounded the point there? *A*. Where the Berkshire was?

×-*Q*. 41. Yes, in the river. *A*. She was to the westward of the barge. I could not say exactly where she was.

DEPOSITION OF FRANK W. ROCKWELL.

Direct Examination by MR. CARVER.

Q. 1. What is your name? *A*. Frank W. Rockwell.

Q. 2. Where do you reside? *A*. Pawtuxet.

Q. 3. What is your occupation, and how old are you? *A*. I am not doing anything just at present; I am thirty-three years old.

Q. 4. Did you see the collision between the Berkshire and barge No. 4 N. & W., during last August? *A*. Yes, sir.

Q. 5. Where was you? *A*. I was down on the west shore, down below Pawtuxet beacon, fishing.

Q. 6. How far from the place of the collision? *A*. As near as I can guess, about an eighth of a mile.

Q. 7. Up or down? *A.* Down.

Q. 8. Lower down the river? *A.* Yes.

Q. 9. Did you notice the tug and the barge as they came by you? *A.* Yes, sir.

Q. 10. How near did they come to you? *A.* Oh, within a very short distance; I should think — let's see — within one hundred and fifty yards, I guess.

Q. 11. Did you take any notice of the tow? *A.* I did; yes, sir.

Q. 12. Did you take any notice of the tow line that connected the two? *A.* Yes.

Q. 13. Did you make any estimate of the distance, how long it was? A. Well, I should think between five hundred and six hundred feet.

Q. 24. Are you acquainted with the barges going up the river? *A.* I have seen a number of them going up.

Q. 15. How did this tow line compare with the usual length of tow line? *A.* Well, it was an unusually long one. I have not seen one since as long as that.

Q. 16. Did you notice the Berkshire before the collision? *A.* Yes, sir.

Q. 17. Did you notice what she was doing? *A.* Before the collision?

Q. 18. Yes, sir. *A.* She was backing; it looked so to me. I could see her churning up the water with the wheel.

Q. 19. Did you notice how the barge and tug were with reference to the channel before the collision? *A.* I suppose they were following as near the centre of the channel as they could.

Q. 20. Did you notice how they lay with reference to the banks? *A.* No, sir.

Q. 21. Do you know anything about the channel there? *A.* No, sir.

Q. 22. How were they heading? Directly up stream or across stream? *A.* They were heading, while I watched them, a little to the northeast; at the time when I was on the river there, of course I had my back to them; I was fishing on the ebb tide and looking down the river; I heard the whistle blow and looked down and saw the Berkshire coming.

Q. 23. Did you hear any whistle from the tug? *A.* I heard one whistle; could not say which one blew it.

Cross Examination by Mr. Roelker.

×-*Q.* 24. You had your back to them, you say, and you didn't turn until you heard the whistle? *A.* No, sir.

×-*Q.* 25. And then you think they were heading pretty well to the northeast? *A.* A little more to the northeast than to the east.

×-*Q.* 26. And following, as near as you could judge, to the centre of the channel? *A.* Yes, sir.

DEPOSITION OF JOHN H. MAGUIRE.

Direct Examination by Mr. Carver.

Q. 1. What is your full name? *A.* John H. Maguire.

Q. 2. Where do you live, and what is your occupation? *A.* I live in Providence, and am collector for the Narragansett Brewing Company.

Q. 3. What was your occupation in August last? *A.* Port-master of the port of Providence.

Q. 4. Did you see the collision between the Berkshire and the barge? *A.* No, sir.

Q. 2. Did you see the tug N. & W. No. 1 after she came up? *A.* Yes, sir.

Q. 6. Did you, or not, see any hawser on that vessel? *A.* Yes, sir.

Q. 7. Where was the hawser you saw? *A.* On the port side, aft of the tug.

Q. 8. In what condition? *A.* It was all wet.

Q. 9. Was it coiled? *A.* Yes, sir.

Q. 10. Was the whole of it wet? *A.* Yes, sir.

Q. 11. Did you look at the coils, and see about the size of it? *A.* I could judge about the size of it.

Q. 12. About how many fathoms should you judge there was in the hawser? *A.* I should judge there was between eighty-five and ninety fathoms.

Q. 13. Did you make an estimate of the length at the time? *A*. No, I did not. I just noticed the height of the hawser where it was coiled up, and judged from the size of the pile that it was between eighty and ninety fathoms.

Q. 14. Did you have any conversation with the captain of the tugboat at that time? *A*. Yes, sir.

Q. 15. About the collision? *A*. Well, yes.

Q. 16. Just state what conversation that was. *A*. I first heard of the collision on the bridge. I was notified by the captain of the Minneola, Captain Carr. He told me about the collision down the bay, and I went immediately down to the dock and was there when he came in. I asked the captain what the trouble was, told him my position; went there for the purpose, if the barge was in the way, to notify outgoing steamers. The captain came out of the pilot house, and his pilot was there; both of them came out at the same time. There was another gentleman with them; I don't know who he was, but I asked him the trouble and he told me that he was going up the river and the Berkshire going down, and she ran into the barge and sunk her; and I asked him whose fault he thought it was. He said it was not his, he had blowed the one whistle for the steamer to keep to the port side of him; that would leave the steamer going down on the starboard side, — and the steamer never paid any attention to him; he didn't answer him.

Q. 17. Did he say anything about this hawser? *A*. No.

Q. 18. Did any one say as to whether or not this hawser was the hawser they were towing with? *A*. No, sir.

Q. 19. But you saw the hawser was wet? *A*. Yes, sir.

Q. 20. How large a hawser was it? *A*. I should judge about eighty or ninety fathoms.

Q. 21. Manila hawser? *A*. Yes.

Q. 22. One of those double-reeled cables? *A*. I should judge what they call three-stranded.

Cross Examination by Mr. ROELKER.

×-*Q*. 23. What time of day was this? *A*. I should judge between four and five o'clock.

×-*Q*. 24. How near to four? *A*. I could not exactly tell.

×-*Q*. 25. Nearer to four than to five, you think? *A*. I should think it was nearer to five than to four.

×-*Q*. 26. Is that all the conversation, what you have stated? *A*. Well, I had a conversation with the captain of the steamer.

×-*Q*. 27. No, I am talking about the tug. *A*. That is all.

×-*Q*. 28. What you have told is about all that took place? *A*. Yes, sir.

×-*Q*. 29. How high was this coil of rope? *A*. I should judge it stood up about that high.

×-*Q*. 30. About three feet? *A*. Yes, about that; probably more.

×-*Q*. 31. Will you state just how high you think it was? *A*. About three feet.

×-*Q*. 32. How large in diameter? *A*. I should judge that the coils would reach from the wall to the door.

Mr. CARVER. The width of this room? *A*. Yes.

Mr. ROELKER. How wide would you call that in feet? How far do you call it from the wall to the door? *A*. I should call it about fourteen feet.

×-*Q*. 33. It is on that that you base your estimate? *A*. No, sir.

×-*Q*. 34. On the height and length of the pile that you base your estimate? *A*. Yes, sir.

Direct Examination resumed by Mr. CARVER.

Q. 35. You are acquainted with vessels and with hawsers? *A*. Yes, sir. That was a business of mine at one time, buying rigging of the vessels; I used to buy them in the lump.

DEPOSITION OF WALTER DAVID NYE.

Direct Examination by Mr. CARVER.

Q. 1. Where do you live? *A*. Norfolk.

Q. 2. You came from Norfolk here to give this deposition? *A*. Yes, sir.

Q. 3. What is your business? *A*. Egg dealer.

Q. 4. You were on the Berkshire at the time of the collision in August? *A.* Yes, sir.

Q. 5. What was your position then? *A.* I was standing beside the pilot house.

Q. 6. You were a passenger? *A.* Yes, sir.

Q. 7. You were standing beside the pilot house. On which side? *A.* The left-hand side, facing forward.

Q. 8. How long had you been there? *A.* Well, I was walking over the ship all the way down, viewing the harbor; could not say how long I had been there.

Q. 9. What was the first you saw of this tug, or the barge? *A.* Well, I saw her when we were very close to her. Didn't have any idea that there was to be any collision.

Q. 10. How did she bear from your vessel? *A.* I don't know anything about the points of the compass. She was just about turning the bend, and therefore she was crossing our bow.

Q. 11. What sort of an angle were they coming at? *A.* I think they were coming right straight ahead, right for us.

Q. 12. Which? *A.* The barge.

Q. 13. This was just before the collision? *A.* Yes; when they struck they seemed to be nearly end on.

Q. 14. Before that had you noticed them at all? *A.* No, sir.

Q. 15. Did you notice anything about the distance the tug was from the barge? *A.* I noticed it was a long distance.

Q. 16. How long? *A.* I showed the distance to the lawyer down at the wharf, and he supposed it to be about three hundred feet.

Q. 17. Taking your boat, with reference to your boat how long was it? *A.* The tug was in our rear then, so that it was as long as our boat and probably half again.

Q. 18. Did the hawser hang in the water? *A.* It was not taut at all, because the hawser was too heavy to be.

Q. 19. Did you see the tug before she crossed your vessel's bow? *A.* Yes, sir; saw her coming up the river.

Q. 20. And how did she bear from your vessel when you first saw her? On which side was she? *A.* The right side.

Q. 21. And the barge bore on which side? *A.* The barge seemed straight ahead, because he was on a kind of an angle.

Q. 22. Did you hear any bells aboard of your vessel? *A.* Yes, sir.

Q. 23. How long before the collision, do you think? *A.* Only when he found out that there was to be a collision; only a few seconds.

Q. 24. Where were you when the collision took place? *A.* I went into the pilot house, and when it struck I was frightened and ran out.

Cross Examination by Mr. ROELKER.

×-*Q.* 25. You say you were walking about the ship? *A.* Yes, sir.

×-*Q.* 26. You had no idea of any collision or any danger; you were just viewing the harbor? *A.* Yes, sir.

×-*Q.* 27. And you came forward when they were very close together? *A.* Yes, sir.

×-*Q.* 28. And at that time you say the tug and the tow were just coming round the bend? *A.* Yes, sir.

×-*Q.* 29. If they had been round that, they would have headed straight up, you think? *A.* Yes, sir.

×-*Q.* 30. But as they were going round the bend they seemed to be heading across? *A.* Yes, sir.

×-*Q.* 31. Pretty close to the lighthouse? *A.* Yes, sir.

×-*Q.* 32. You say you heard these bells just a few seconds before the collision? *A.* I didn't hear the bells; I heard the orders for the bells.

×-*Q.* 33. The orders were given when the collision seemed inevitable? *A.* Yes, sir.

×-*Q.* 34. How close were they then, do you think? *A.* Only a few feet.

×-*Q.* 35. How many? *A.* Ten or twelve.

×-*Q.* 36. Then you ran back a little ways, and then you came back again, and when the steamer struck the barge they struck nearly bows on? *A.* Yes, I think so, as far as I could see.

×-*Q.* 37. The steamer was then making considerable headway through the water? *A.* Yes, sir.

×-*Q.* 38. Going about as fast as she had been? *A.* Yes, sir; I think so.

×-*Q.* 39. And the barge was on a hawser, and the hawser was not extremely taut, — it was too heavy, you think? *A.* Yes, sir.

×-*Q.* 40. It was above water, wasn't it? *A.* I could not say; I didn't notice.

×-*Q.* 41. But you think the tug was half a ship's length behind your steamer on the right-hand side? *A.* I should say she was pretty close up behind our steamer.

×-*Q.* 42. A little out to the right? *A.* About fifty feet, I should judge, because we just cleared her.

×-*Q.* 43. Did you see the tug turn a little to the westward before you met her? *A.* No, sir.

×-*Q.* 44. You say that the lawyer down on the wharf thought it was about three hundred feet? *A.* Yes, sir.

×-*Q.* 45. How did you estimate the distance? *A.* I pointed out an object on the dock, and said it was about as far as from where I stood to that point; and Mr. McCloskey said if the Chatham was lying along there her bow would not reach to the object I had named, and she is two hundred and forty feet long.

×-*Q.* 46. Who was it that estimated that it would be about three hundred feet? *A.* It was a lawyer that was there with Mr. McCloskey.

×-*Q.* 47. When was that? *A.* This morning. Mr. McCloskey is the agent of this line.

×-*Q.* 48. Do you know the lawyer's name? *A.* No, sir, I do not. He was with Mr. McCloskey.

×-*Q.* 49. Wasn't it Mr. Littlefield? *A.* It seems to me they told me his name, and it seems to me it was such a name as that.

DEPOSITION OF JOHN H. DIZER.

Direct Examination by MR. CARVER.

Q. 1. What is your full name? *A.* John H. Dizer.

Q. 2. What is your age, residence and occupation? *A.* Twenty-eight years; Boston, Mass.; first officer of the Alleghany.

Q. 3. You came on from Baltimore to give this deposition? *A.* Yes, sir.

Q. 4. During August of last year you were on the Berkshire of the same line? *A.* Yes, sir.

Q. 5. In what position? *A.* First officer.

Q. 6. How long had you been on her at that time? *A.* Nearly two years, — eighteen months.

Q. 7. How long as first officer? *A.* About six months on the Berkshire.

Q. 8. Do you remember what day it was there was a collision in the Providence River between the Berkshire and a barge of the Norfolk & Western Railroad? *A.* Sixteenth of August.

Q. 9. What time did your boat leave the wharf that night? *A.* Half past two.

Q. 10. What time did the collision take place? *A.* Little after three.

Q. 11. Where were you just before the collision? *A.* On deck on the port side, by the pilot house.

Q. 12. How long had you been there at the time of the collision? *A.* Just before the collision took place only a short time.

Q. 13. Were you on deck when you passed the Bay Queen? *A.* I was standing in my room at the time we passed her.

Q. 14. Were any whistles exchanged between your boat and the Bay Queen? *A.* Yes, sir.

Q. 15. How many? *A.* One.

Q. 16. On which side did you pass her? *A.* Right.

Q. 17. Did you notice a tug having a barge in tow after you passed her? *A.* No, sir; I was in my room at that time. I saw the towboat just below Sabin's Point.

Q. 18. Did you see the barge and tow before the collision? *A.* Yes, sir.

Q. 19. How was the towboat towing the barge? *A.* With a hawser.

Q. 20. How long a hawser? *A.* I should judge about ninety fathoms.

Q. 21. How far is it from your room to the wheelhouse? *A.* Twenty or twenty-five feet, I should say.

Q. 22. Did you see the tug before the collision took place with your vessel? A. Yes, sir.

Q. 23. How was she heading when you saw her just before the collision, with reference to your vessel? A. Heading right across us. I cannot say what course she was heading; nearly over to the black buoy.

Q. 24. How wide is the channel for vessels of your draft, should you think? *A.* Not over one eighth of a mile.

Q. 25. Did you, or not, notice any buoy about that time? *A.* Yes, right across, alongside of us.

Q. 26. What buoy? *A.* The buoy off Sabin's.

Q. 27. On the port side? *A.* On the port side of us.

Q. 28. How close did you pass it? *A.* Fifteen or twenty feet.

Q. 29. Can you go any further on that side of the channel? *A.* No, sir.

Q. 30. How far do you think you were from the buoy when the collision took place? *A.* We had not passed it; about under our quarter, I should say, when we struck.

Q. 31. How were you heading with reference to the channel at that time? *A.* We were heading south southwest.

Q. 32. What is your regular course? *A.* Southwest one half south.

Q. 33. Did you hear any orders given aboard your vessel? *A.* No, sir.

Q. 34. Did you hear any bells rung to the engine? *A.* Yes, sir; I heard bells; I couldn't tell what they were until I came to the pilot house and saw the indicator as I went by the door.

Q. 35. What did you see? *A.* Back full speed.

Q. 36. How was the vessel going when you saw the indicator? *A.* Moving ahead very slowly.

Q. 37. Did you feel her shake at all? *A.* Yes, sir.

Q. 38. Did you see the collision yourself? *A.* Yes, sir.

Q. 39. Where were you when the collision took place? *A.* On the port side.

Q. 40. How far from the bow? *A.* Right by the pilot house, fifty feet from the bow, I should say.

Q. 42. How did they strike? *A*. Our port bow struck our starboard bow.

Q. 43. What did you do after they struck? *A*. I went down over the bow to see how badly we were cut open.

Q. 44. Did you go aboard the barge? *A*. I had my feet on her before she sunk.

Q. 45. Did you see any men on the barge? *A*. I saw two.

Q. 46. Where were they? *A*. One was speaking to me, and the other was by the wheel.

Q. 47. The one speaking to you, where was he? *A*. Way up forward in the bow of hér.

Q. 48. Could you see how fast the tug and barge were going before the collision? *A*. I should say about six or eight miles.

Q. 49. How fast was your vessel going at the time of the collision? *A*. Hardly moving.

Q. 50. How was the tide that day? *A*. Ebb tide.

Q. 51. The tide was with you? *A*. Yes, sir.

Q. 52. How could you tell about the speed of your vessel? *A*. Lighthouse right abreast of us, and buoy too.

Q. 53. Was there anything that could have been done aboard of your vessel to have prevented the collision, in your opinion? *A*. No, sir; I do not think there could.

Q. 54. What would have been the result if your vessel had put her helm hard a-port? *A*. Cut our bow off then.

Q. 55. What would have been the result if the barge had changed her helm? *A*. If she had put her wheel to starboard she would have gone clear of us.

Q. 56. After the collision what did you do on your boat? *A*. Laid around a few minutes and then went back to the wharf.

Q. 57. Did you go back to the place where the barge was sunk? *A*. Right close to her.

Q. 58. Which side of her did you go? *A*. North and west, sir.

Q. 59. Did you hear any orders given in the pilot house as to the helm on your vessel? *A*. No, sir.

Q. 60. Did you hear any whistle from the tugboat any time? Hear any signal given from your vessel to the tugboat? *A*. No, sir.

Q. 61. You were not on watch at this time? *A*. No, sir.

Q. 62. Who had charge of your ship? *A*. Captain.

Q. 63. Was it possible for your vessel to go any further on the easterly side of the channel? *A*. No, sir.

Q. 64. What was there to prevent it? *A*. Bank, — rubbing up against the bank then.

Q. 65. You were right against the bank? *A*. Yes, sir.

Q. 66. How long were you on deck before the collision? *A*. I couldn't say the time. They came and told me there was going to be a collision, and I came right up on deck. We were on top of the barge then.

Q. 67. How long does it take to stop your ship? *A*. One minute and twenty-eight seconds.

Q. 68. How do you know? *A*. Tried it.

Q. 69. When did you try it? *A*. Eighteenth day of August.

Q. 70. Who had charge of it when you tried it? *A*. I was on watch, and the captain.

Q. 71. Anything more that you would like to say about this collision? *A*. No, sir.

Cross Examination by Mr. ROELKER.

×-*Q*. 72. Mr. Dizer, how did you come to try this on Aug. 18? *A*. We thought we would try it, and see how long it would take to stop her.

×-*Q*. 73. Was that in consequence of this collision? *A*. Yes, sir.

×-*Q*. 74. What was said about it? *A*. What do you mean?

×-*Q*. 75. What was the conversation you had about it,— about making this trial? *A*. We thought we must have been stopped in that time, at the time of the collision. At the time we tried her she was going full speed, but we never go as fast down the river. She would stop in less time in the river.

×-*Q*. 76. Do you know whether or not the engines were going full speed at the time of the accident? *A*. The indicator said full speed back.

×-*Q*. 77. Just before you were going full speed ahead, just before the engines were reversed? *A.* We never have head steam going down the river, never did.

×-*Q.* 78. Do you know whether or not you were stopped at the time of the collision? *A.* We thought we were just about stopped at the time of the collision? At the time I came out of my room, looking at the lighthouse, she was going ahead very little then.

×-*Q.* 79. Now, I understand you, some one told you there was going to be a collision? *A.* Yes, sir.

×-*Q.* 80. Who was that? *A.* I think his name was Nye.

×-*Q.* 81. He told you there was going to be a collision? *A.* Yes, sir; I was in the doorway of my room.

×-*Q.* 82. You jumped up and came on deck? *A.* I was standing in the doorway.

×-*Q.* 83. You came right up on deck? *A.* Yes.

×-*Q.* 84. And then you were just about at Pomham? *A.* I left the pilot house at Pomham.

×-*Q.* 85. When you left Pomham could you see this tug and barge below? *A.* Yes; just below.

×-*Q.* 86. Where was the tug then? *A.* Below Sabin's Light. I cannot say the distance.

×-*Q.* 87. When you next came out was just as the collision occurred? *A.* Just before; twenty or twenty-five feet from the barge.

×-*Q.* 88. When you came out of your room? *A.* Yes, sir.

×-*Q.* 89. From your room to the pilot house is twenty-five feet? *A.* Yes.

×-*Q.* 90. After you left your room, and as you went towards the pilot house, you heard the bells given to stop the engine, did you? *A.* No, sir; when I was in my room.

×-*Q.* 91. When you came out, the collision happened instantly? *A.* Yes; in no time at all.

×-*Q.* 92. At that time, you say the tug was against your bows? *A.* The tug was way up the other side of us.

×-*Q.* 93. On your starboard quarter? *A.* Starboard side of us.

×-*Q.* 94. When you say this hawser was ninety fathoms long, I do not understand that you made any measurement of it, or estimated at all? *A.* No, sir; I judged of it. I do not know anything about it. I judged the boat to be about two ship lengths from the barge.

×-*Q*. 95. You do not know whether the hawser had been parted at that time or not, do you? *A*. It could not have been parted. She was towing her up.

×-*Q*. 96. Did you look to see where the tug was away from the barge? *A*. Yes, sir.

×-*Q*. 97. You made this estimate at the time? *A*. Yes, sir.

×-*Q*. 98. You stopped to think how far off she was? *A*. I could tell by the black buoy. The tugboat was pretty close up to the black buoy on the north of the channel.

×-*Q*. 99. You have stated your regular course down there as south southwest, have you? *A*. No, sir; southwest one-half south.

×-*Q*. 100. You usually go down on the west side of the channel in running out of that harbor? *A*. What do you mean?

×-*Q*. 101. I mean, keep more to the westward than you were on this occasion? *A*. Yes, sir; we had started ahead. He put his wheel to starboard to try to swing, and she came up, and then reversed the engines and she swung around a little mite.

DEPOSITION OF FRANK P. BARROWS.

Direct Examination by Mr. GREEN.

PROVIDENCE, Oct. 23, 1894.

Q. 1. What is your residence and occupation at present? *A*. Residence, Providence; occupation, deputy sheriff.

Q. 2. Have you at any time been on steamboats on Providence River, and if so, when, and in what capacity? *A*. Well, I ran three seasons past for the Continental Steamship Company, *i. e.*, with the exception of this season. I didn't run all this season; only spare.

Q. 3. What steamers were you on in the summer of 1893? *A*. Steamer Planet, *i. e.*, at this time I was; the last of the season.

Q. 4. Were you on the Planet in 1893? *A*. I was; yes, sir.

Q. 5. Were you going down the river on the Planet, on the afternoon of Aug. 16, about three o'clock? *A*. Yes, sir; we left the dock at 2.30.

Q. 6. Did you see this collision between the Berkshire and the towed boat? *A*. I did; yes.

Q. 7. Where was it? Where did you see it? *A*. Well, the position of the Planet — we had just turned Sabin's Point Light.

Q. 8. What other steamers were there within view? Do you remember? *A*. Steamer Bay Queen and Petrel. That is all, with the exception of our boat, the Planet.

Q. 9. Now, will you kindly state to the examiner what the position of the Berkshire was, and what you saw of this collision? *A*. Well, the Berkshire was going south, *i. e.*, going down the river; the tug was going up.

Q. 10. What part of the channel was the Berkshire in? A. The Berkshire was to the east of the channel.

Q. 11. Where was your steamer — the Planet? How far from the Berkshire? *A*. At the time of the collision?

Q. 12. Yes. *A*. Well, at the time of the collision we had just passed the Sabin's Point Light and turned to make Bullock's Point wharf.

Q. 13. About how far were you then from the Berkshire? *A*. Well, say two or three hundred feet at the time of the collision.

Q. 14. Did you notice the distance between the towboat and the coal barge that it was towing? How long was the tow line apparently? *A*. What do you mean by the distance? The distance apart?

Q. 15. Yes. *A*. Well, at the time our attention was called to it, Captain Rich says, "You want to look out. You will see some fun". At that time the Berkshire had come to a stop, and the tug kept on her course up the river. The position of the Berkshire was then this side of the turn in the channel.

Q. 16. Well, now can you give us an idea how long this tow line was, or how many times the length of either the Berkshire or the barge that was towed? *A*. Well, I couldn't give it to you in feet, only this way: that it extended quite a distance ahead and astern of the boat. I should say it was in the neighborhood of three times the length of the Berkshire, whatever her length is. I don't know what her length is.

Q. 17. That is, the towboat had passed the Berkshire — *A*.

Passed the Berkshire, and kept right on her course; and of course as the towboat had passed the Berkshire she was in a different position. The towboat was in one turn of the channel and the Berkshire was in the other, *i. e.*, I should say the middle of the hawser was about in the turn of the channel, so as the towboat kept on her course she necessarily pulled the barges right into her, because the tide in the channel there would carry her right to the bow of the Berkshire.

Q. 18. Are you familiar with the channel down there? *A.* Well, in what way?

Q. 19. Its width and direction. *A.* Yes; it is all staked out by buoys. That is the only way I know it.

Q. 20. Do you know how much water there is in it? *A.* No, I don't; not the depth. I know it is very deep.

Q. 21. What I asked you those questions for was that I was going to ask you whether, from what you saw, the Berkshire could have gotten more to the eastward of the channel than she was? *A.* As I understand from the position of the buoys, she couldn't; because the buoys are set right on the edge of the channel, as I understand it, and if she had gone east of the buoys she would have gone on the flats. The channel there is narrow.

Q. 22. At the moment of the collision where was the Planet? *A.* Between two and three hundred feet, I should say. I should say it was three hundred feet from the collision.

Q. 23. Have you had any experience in steering boats at all? Have you ever acted as pilot? *A.* No; but I have always handled the wheel in all the boats that I have been on. Making landings it is always customary for pursers to loaf in the pilot house when they have nothing to do.

Q. 24. Have you been sufficiently in intercourse, or heard enough of the opinions of the people who run steamboats on the bay, to be able to tell me whether there is or is not any common opinion among them that a long hawser is dangerous in a narrow winding channel, and in the upper part of Providence River? [*Objected to as immaterial and irrelevant, and because the witness is not qualified.*] *A.* I should say they are, — that long hawsers are dangerous.

Q. 25. That is your opinion. I ask you whether there is any agreement of opinion among the men you have heard. *A.* All the steamboat men that I have talked with have always claimed that they are, and they don't believe they have any right to come up into the channel in that position. I have always heard this conversation when I have been in the pilot house when these tows have been coming up. Sometimes there would be a tow of six barges, one behind the other.

Cross Examination by Mr. ROELKER.

×-*Q.* 26. You are a deputy sheriff now? *A.* Yes, sir.

×-*Q.* 27. And your business has been running as purser, you say, for several summers on these steamers? *A.* Continental Steamboat Company; yes.

×-*Q.* 28. How far had you gotten in towards Bullock's Point landing when Captain Rich called your attention to the towboat and the Berkshire? *A.* Well, we had just turned the light when he called our attention to it.

×-*Q.* 29. You were running at full speed then yourself? *A.* Yes.

×-*Q.* 30. How fast should you say that was? *A.* Well, I should say that boat would go ten miles an hour.

×-*Q.* 31. And you had passed the light? *A.* We had just turned the light.

×-*Q.* 32. Where were you? *A.* In the pilot house.

×-*Q.* 33. And he called your attention to it? *A.* Well, Captain Dibble and myself were there. He didn't say anything particular to me, but he said, "You will see some fun."

×-*Q.* 34. And then you saw the boats in the situation that you named? *A.* Yes.

×-*Q.* 35. The tug had passed the Berkshire? *A.* No, she hadn't passed. She had got up abreast, or nearly abreast.

×-*Q.* 36. Nearly abreast of the Berkshire? *A.* Yes.

×-*Q.* 37. And had you heard any signals prior to that? *A.* Well, I heard the Berkshire blow twice.

×-*Q.* 38. When was that? *A.* That was before we had turned the light.

×-*Q.* 39. Did you notice where the Berkshire was at that time when she blew twice? *A.* Well, she was coming down on the east of the channel.

×-*Q.* 40. About where in the channel? *A.* Well, I should say she was half the distance between the Riverside wharf, *i. e.*, abreast Riverside wharf and the light.

×-*Q.* 41. Would that be some distance above the red buoy there? *A.* Why, yes. It is about the distance they usually blow when they are approaching.

×-*Q.* 42. I asked you where she was. *A.* I told you, as near as I can illustrate. Half the distance between abreast of Riverside wharf and the light.

×-*Q.* 43. Where would that bring her with reference to the red buoy? *A.* Well, I should say from here to Turk's Head, as near as I could say.

×-*Q.* 44. A quarter of a mile above the red buoy? *A.* Well, if you call that a quarter of a mile, I should say a quarter of a mile.

×-*Q.* 45. I don't know whether it is a quarter of a mile or not. *A.* Well, I don't.

×-*Q.* 46. Then when you saw the tug, just before the collision, she had passed the Berkshire to the westward? *A.* No. I saw her before she had passed; had gotten nearly abreast.

×-*Q.* 47. And she did pass her from the westward, didn't she? *A.* She did pass her from the west; yes.

×-*Q.* 48. Then you think you saw the Berkshire stop? *A.* No; the Berkshire had stopped before. She stopped before that. She was on the other side of the channel.

Mr. GREEN. Which do you mean by she? *A.* I mean the tug was on the other side of the channel.

×-*Q.* 49 (*by* Mr. ROELKER). The tug had passed the Berkshire to the west? *A.* Yes.

×-*Q.* 50. And did you actually see the collision? *A.* Why, certainly.

×-*Q.* 51. Now, how did they come together? *A.* Why, the bow of the barge struck the steamer on the port side.

×-*Q.* 52. Struck the port side of the steamer? *A.* Yes, sir.

×-*Q.* 53. Which side of the barge? *A.* The barge struck square, and took her whole nose off.

×-*Q*. 54. Didn't it strike one side or other of her nose? *A*. Well, it might have had a tendency to strike on the starboard, but it struck the stem, I should say.

×-*Q*. 55. You should say it struck the stem, and not the starboard side of the stem? *A*. Yes.

×-*Q*. 56. And after the collision did you watch what the Berkshire did? *A*. After the boat sunk, she backed in and turned around and came up the river.

×-*Q*. 57. Didn't you notice that she backed her stern off toward the lighthouse to the eastward after the collision? After she struck the barge — *A*. After the barge struck her, you mean?

×-*Q*. 58. After she struck the barge, didn't she turn her stern to the eastward and go down the river — back down the river below the barge? *A*. No; she couldn't have gone to the eastward.

×-*Q*. 59. I didn't ask you what she could have done. I asked you what she did do, if you know. If you don't know, say so. *A*. Well, I don't. I know that she came back to Providence.

×-*Q*. 60. That is all you know about it? *A*. I know that.

×-*Q*. 61. You don't remember as to that? *A*. I won't be positive.

DEPOSITION OF WILLIAM D. FLANAGAN.

Direct Examination by Mr. Green.

Q. 1. What is your business, Flanagan? *A*. Pilot.

Q. 2. How long have you been pilot? *A*. Three years.

Q. 3. Duly licensed? *A*. Yes, sir.

Q. 4. On what waters do you go? *A*. From the coast of Maine to New York, and intermediate points.

Q. 5. Also Narragansett Bay? *A*. Yes; bays and harbors and sounds between. This is the first license I ever had — Narragansett Bay.

Q. 6. How long have you been familiar with the waters of Narragansett Bay? *A*. Ever since nine or ten years ago. I was about sixteen or seventeen years old. I used to work on the boats here.

Q. 7. Were you a pilot in the summer of 1893? *A*. Yes, sir.

Q. 8. On what vessel? *A*. The Planet.

Q. 9. Were you on the Planet when she went down the bay on Aug. 16, 1893, between two and three o'clock? *A*. Yes, sir.

Q. 10. What was the weather then? Do you remember? *A*. Clear weather.

Q. 11. When you were off Sabin's Point, going down, what steamers were in your vicinity? *A*. Well, the Berkshire and Bay Queen, and N. & W. No. 2 and barge, and the Petrel was astern.

Q. 12. Where were you on the Planet at that time? *A*. Well, just come out of the water-closet. Standing forward on the lower deck.

Q. 13. Did you see the Berkshire and this towboat and the barge just before and at the time of the collision? *A*. Yes, sir. I was watching it before and after they struck.

Q. 14. Will you kindly state to the examiner what you saw, what the positions of the vessels were, and what took place? *A*. Well, the Berkshire at the time was coming down —

Q. 15. What part of the channel was the Berkshire in, and what part were you in? *A*. She was about in the center then, and we were to the eastward of her as we were to make a turn; and the Bay Queen and the tug were going up towards her.

Q. 16. Did you see the Bay Queen pass the Berkshire? *A*. Yes, sir; I saw her pass the towboat first, and by us and the Berkshire.

Q. 17. Which side of the Berkshire did the Bay Queen pass? *A*. On the port side; eastward of her.

Q. 18. The Bay Queen passed to the eastward of the Berkshire? *A*. Yes, sir.

Q. 19. And were you going to the east of the Berkshire too? *A*. Going to the eastward of her.

Q. 20. That is, the Berkshire was on the west of you? *A*. Yes; certainly.

Q. 21. How long was the tow line at that time, if you noticed, between the towboat and the barge? *A*. I should say it was seventy-five or eighty fathoms; I should guess about that.

Q. 22. Will you describe the collision? *A*. Well, they were going along; the Berkshire blew a whistle, and the Bay Queen answered it, and then she blew two, and we answered it. I saw the towboat had got up a little ways past her, and she slacked up a little, and then the barge took a sheer, and knew then there was going to be a collision.

Q. 23. How much of a sheer did the barge take? *A.* A slight sheer to the eastward. Of course, you stop a barge and they lose control of their wheel, and lay helpless. They haven't control of the wheel, and they have no steerage. I knew they were going to come in collision unless the other fellow cut across the hawser. We ran inside of the buoy to avoid them. We went inside of the buoy altogether.

Q. 24. How much water did you draw? *A.* Seven feet.

Q. 25. Now, you spoke about this sheer which was taken by the coal barge. Did the towboat apparently keep the hawser tight during this time? *A.* Well, she did for a time, and then she slacked up. I suppose they saw the collision was coming.

Q. 26. Slacked up before the collision? *A.* Oh, yes. The hawser was slackened down then. It is hard work to tell. They don't keep the hawser tight. They can't keep it out of water.

Q. 27. But I mean it was pulling taut? *A.* The towboat had stopped. Of course the barge would keep the headway on a couple of miles.

Q. 28. What part of the Berkshire struck — what part of the coal barge? *A.* She struck on the starboard bow.

Q. 29. What struck what? *A.* The steamer struck the barge right on the starboard bow, right at the cathead or the anchor. She struck her right head on; maybe a little glancing.

Q. 30. Now, in your judgment as a pilot, could the Berkshire have swung off sufficiently to the westward so as to pass, leaving the tow and the towboat on the east? *A.* She could if she had started long before she came up to him; but they were about in the middle of the channel. It was a bad position all the boats were in. They were all bunched up, just about the same as they bunch you up when they come to examine you, and ask you how you would go.

Q. 31. How far could the Berkshire have seen this towboat coming up? *A.* She could see her, I guess, five miles. She could see her clear to Conanicut Light. But that was another reach; not a straight run. Where they met, you have got to head the bow north, and then throw the wheel say about northeast and make a sharp turn.

Q. 32. In your opinion as a pilot, could the Berkshire have hugged the east shore more closely than she did? *A*. I don't think she could. Her propeller will run her right away from the bank, and she would sheer off; and that is what I imagine she did at the time. She will sheer off if she comes to a bank.

Q. 33. From what you saw of this collision, do you consider the Berkshire at fault? *A*. Well, I don't know. That would be hard work to tell. I think it was a blunder on the part of both of them. That is what I should think.

Q. 34. From what you saw of the collsion, could the towboat have avoided it? *A*. I don't think she could have got the barge out of the way.

Q. 35. In towing a barge with seventeen hundred tons of coal in it, — two hundred feet long or thereabouts, — do you think it is safe for the towboat to be using a hawser eighty fathoms long? *A*. Not in that bend there.

Q. 36. Is it safer, in your judgment, to tow alongside? *A*. Yes, it is. You have got to take them on a long hawser, but not as long as that. I shouldn't do it, because I would be afraid I would ground her there.

Q. 37. In narrow and winding passages at the upper part of Narragansett Bay and Providence River, do you think that it is prudent seamanship for a towboat to be towing such a barge as I have described with a tow line eighty fathoms long? *A*. No; I don't think it is a good idea.

Q. 38. Do you know, from your observation, whether since August, 1893, the towboats have or have not used shorter hawsers? [*Objected to as immaterial and irrelevant.*] *A*. Well, I think they used shorter since that. I think they used shorter hawsers since that.

Q. 39. In your judgment, when she came to this turn in the river, could the Berkshire have sheered off to the westward? *A*. At that turn?

Q. 40. Yes; so as to have avoided the collision. *A*. Well, I think it would be dangerous for her to sheer off, because she is so big. I suppose long before she got to the turn she would have had to start, but then she couldn't tell — of course she and the Bay Queen coming together, it was hard work to figure the path that they would make. The Bay Queen was pretty close to her.

Q. 41. After this collision took place, can you tell us with any particularity what the conduct of the Berkshire was? *A*. After it took place?

Q. 42. Yes. *A*. After she struck it she knocked the barge way off — pushed her way to the west of the channel, and then she backed out and got aground two or three times herself in trying to turn around and go back to the city.

Cross Examination by Mr. Roelker.

×-*Q*. 43. Mr. Flanagan, how old are you? *A*. Twenty-five.

×-*Q*. 44. How long have you had a license as pilot? *A*. Three years.

×-*Q*. 45. Whose employ have you been in? *A*. Well, I have been in towboat companies' around here, and the Pawtucket Steamboat Company's, and the People's Steamboat Company's now in Fall River — a new company formed last season.

×-*Q*. 46. In what capacity? *A*. Pilot.

×-*Q*. 47. Of what boats? *A*. Well, I was a pilot on the Reliance, once towing around here, and last season on the Planet, and this season on the King Philip. On the King Philip now.

×-*Q*. 48. How big a boat is that? *A*. One hundred and thirty-four tons. The Planet is one hundred and two, I think.

×-*Q*. 49. They are both small boats? *A*. Yes.

×-*Q*. 50. What is the biggest boat you have ever been on? *A*. The King Philip. I have been as a deck hand on big boats.

×-*Q*. 51. But your experience in piloting is limited to these small boats you have spoken of? *A*. It has.

×-*Q*. 52. You haven't had any experience as pilot on a large boat or on a tug? *A*. No; I am waiting for that.

×-*Q*. 53. Now, there would have been no difficulty, would there, in the Berkshire passing this tow and tug to the westward, if she had started to do it when she was up by the black buoy, and when the tug was at Sabin's Point Light? *A.* There would have been no trouble, then.

×-*Q.* 54. If she had started on her course then, she could have passed her to the westward. Now, did you hear any whistles that day? *A.* Yes; I heard the Berkshire blow one whistle.

×-*Q.* 55. Who to? *A.* Any one could have taken it. The Bay Queen took it.

×-*Q.* 56. Did you hear the Berkshire blow after that? *A.* She never blew again.

×-*Q.* 57. The only whistle you heard the Berkshire give was one whistle? *A.* To the Bay Queen. It was good to either one that wanted to answer it.

×-*Q.* 58. And the Bay Queen answered it? *A.* Yes.

×-*Q.* 59. Did you hear the tug whistle? *A.* No; she didn't whistle.

×-*Q.* 60. When the Berkshire backed after the collision, she got aground once or twice, and came down under the stern of the barge, and went up to the city on the west side? *A.* I don't know whether she went under the stern to go home; because she was so long doing that, and we went in, and landed our passengers, and went back.

×-*Q.* 61. You saw her fall away there? *A.* Yes. After she struck the barge she pushed her well to the westward.

×-*Q.* 62. Now, you have seen a great deal of this towing on tow lines here? *A.* Yes. I have towed some barges.

×-*Q.* 63. Here on Providence River, in your observation? *A.* Yes.

×-*Q.* 64. And it has been a common practice? *A.* Yes; they do take them on hawsers right along; always take a vessel to sea on a hawser.

×-*Q.* 65. And they take not only one barge, but four or five in a string? *A.* Yes; but they have them pretty short up then.

×-*Q.* 66. They have the rear ones shorter? *A.* Yes.

×-*Q.* 67. But the first one between the barge and the tug is the same. *A.* They put out about forty fathoms of hawser. That is to keep the eddies from the tug away from the barges.

×-*Q*. 68. To keep the quick-water away? *A*. Yes.

×-*Q*. 69. Now, you say you saw the towboat slack up before the collision? *A*. Well, just about as she began to lap up on to the Berkshire. Just about as she got to the Berkshire to lap on her, I noticed the hawser then. The hawser lay in the water. They can't keep it out of the water.

×-*Q*. 70. It always does? *A*. At any time they can't keep it out.

×-*Q*. 71. But you noticed that she slowed up? *A*. Yes.

×-*Q*. 72. And you think she slowed up just about the time when she lapped up alongside of the Berkshire? *A*. Yes. And I could see then that there was a collision right off.

×-*Q*. 73. At that time you noticed the slacking up which you have spoken of? *A*. Yes.

×-*Q*. 74. And you also noticed this sheer of the barge at the same time? *A*. The barge took a sheer to the eastward.

×-*Q*. 75. She took a sheer, you think, to the eastward? *A*. Yes. After she began to slack up she was like a mud scow. You have got to keep headway.

×-*Q*. 76. How fast was she going before that? *A*. Going hooked up full speed.

×-*Q*. 77. Now, do you mean to tell me that a barge going at full speed would loose her steerage way in the time that she would run sixty or one hundred fathoms? *A*. The minute you slack up on the hawser the barge will take a sheer.

×-*Q*. 78. The moment the tug stopped you could see that a collision was inevitable? *A*. Yes; unless the Berkshire went way to the eastward. You could see then that they were coming together.

×-*Q*. 79. Now, didn't you see the head of the Berkshire go around to starboard — to the westward? *A*. I didn't notice it particular. She couldn't swing to the westward. She could a little, but she couldn't unless she went across the hawser first.

×-*Q*. 80. Did you notice whether or not the Berkshire had reversed her engines at this time? *A*. Oh, she was reversed.

×-*Q*. 81. When you reverse the engines of a propeller like that, what is the tendency to affect her head? *A.* It is according to how your rudder is.

×-*Q.* 82. Suppose her propeller was a right-handed propeller, what would be the effect? *A.* Well, it would then throw her head to the westward.

×-*Q.* 83. And didn't you notice, as a matter of fact, that her head was thrown to the westward? *A.* Well, I looked at her and at the barge, and I didn't take notice whether the head was thrown to the westward or not.

×-*Q.* 84. You didn't notice that? *A.* No; but I know that motion of the wheel will do it.

×-*Q.* 85. It would do that thing? *A.* Yes, it would. The moment she is going ahead, and you stop her, it is inclined to give her a twist.

×-*Q.* 86. And the bank on the east side would have a tendency to throw her head off? *A.* That would sheer her right off. She will do that, — sheer right off.

×-*Q.* 87. When you passed the Berkshire up stream, how fast was the Berkshire going? *A.* She goes on one bell down the bay altogether. She don't go full speed.

×-*Q.* 88. Going about eight knots? *A.* Yes, she might have been about that. Probably more.

×-*Q.* 89. You were going along faster? *A.* We were going along hooked up.

×-*Q.* 90. And you passed her? *A.* Yes.

×-*Q.* 91. And you went inside of the buoy? *A.* Yes. Anything can pass them going down, because they go slow. We passed her.

Direct Examination resumed by Mr. GREEN.

Q. 92. Mr. Flanagan, was there some explanation you were about to make? *A.* Suppose the Berkshire should start to go to the westward, and the towboat should have blown two whistles, she would have to alter her course and go back to the eastward again.

Cross Examination resumed by Mr. ROELKER.

×-*Q.* 93. Suppose the towboat didn't blow two whistles. *A.* Then she could have kept along.

×-*Q.* 94. Now, you say you are a pilot? *A.* Yes, sir.

×-*Q.* 95. What is the rule, if you know, about vessels passing each other in a channel in a fair way — the rule of the road? *A.* Passing in this channel, one whistle requests you to go to the right, and two to the left. Whichever blows first has the right of way.

×-*Q.* 96. What is the rule outside of that, if you know, about vessels passing each other in a channel, or fair way? *A.* If it is a narrow channel, you are supposed to slack down and go to the right, not exceeding five miles an hour.

×-*Q.* 97. What else? *A.* To keep to the starboard side of the channel, if you can.

DEPOSITION OF HENRY MILLER.

Direct Examination by Mr. GREEN.

Q. 1. Where do you live? *A.* I live on School Street, Pawtucket.

Q. 2. How old are you? *A.* Twenty-two years old.

Q. 3. Were you on the Petrel last summer? *A.* Yes, sir.

Q. 4. Where does the Petrel run? *A.* Runs from Pawtucket to Bullock's Point.

Q. 5. What was your capacity? What were you doing on the Petrel last summer? *A.* Deck hand.

Q. 6. Do you remember this afternoon of Aug. 16, when the Berkshire collided with the coal barge? *A.* I do.

Q. 7. Where was your steamer at that time? *A.* Right abreast Sabin's Point.

Q. 8. Did you see the collision? *A.* I saw the collision; yes, sir.

Q. 9. What steamers were in view then? *A.* Well, I don't really remember. When we got into Bullock's Point, I remember seeing the Planet. That is all I do remember.

Q. 10. Do you remember seeing the Berkshire going down, and the towboat of the N. & W. going up? *A.* Yes, sir.

Q. 11. How far were you from the collision at the time it happened? *A.* Well, probably two hundred yards, or three hundred yards.

Q. 12. How long was the tow line, apparently, between the tow boat and the towed barge? *A*. Well, I should say about two lengths and a half of the Berkshire.

Q. 13. Is there a turn of the channel there? *A*. Yes; a very short turn.

Q. 14. Now, will you describe what you saw of this collision? Take your own time about it, and describe it in your own way. *A*. Well, as near as I could judge, the Norfolk & Western towboat was going up, and the towboat had made the turn; the barge was on her stern, the Berkshire had passed the towboat. I heard one whistle; couldn't say where it came from, whether from the Berkshire, the towboat, or some other steamer. I was talking at the time. After the Berkshire had passed by the towboat, I noticed there was going to be an accident. The barge was crowding in pretty close to the buoy on the same side that the Berkshire had to pass. The Berkshire was up against the bank, and she was on the bank pretty close to it. She was crowded up against the east side of the channel, and she had to go on her port side, and this barge was going up on her starboard. That is all I know until I see the collision.

Q. 15. When you saw the towboat with the barge in tow going up, what part of the channel and how much of it did this tow occupy? *A*. She occupied pretty near the whole length of it — the entire.

Q. 16. The whole what? *A*. The barge came pretty near crowding the whole business out. She had it all, nearly.

Q. 17. You said the whole length of the channel. *A*. I meant the whole width of the channel. She had it all.

Q. 18. Did you see before the collision any slacking up on the part of the towboat? *A*. No, sir; there was no slacking up.

Q. 19. Did you notice any sheer on the part of the barge? *A*. Well, a little mite.

Q. 20. How many years have you been running on the river? *A*. About three.

Q. 21. For what company? *A*. Pawtucket Steamboat Company.

Q. 22. Does the Petrel belong to that company? *A*. Yes, sir.

Cross Examination by Mr. Roelker.

×-*Q*. 23. Which way did the barge sheer? *A*. She was sheering to the eastward.

×-*Q*. 24. How long before the collision was that? *A*. Well, I should say probably half a minute or a minute.

×-*Q*. 25. Half a minute before the collision? *A*. Yes, sir.

×-*Q*. 26. You say she sheered to the eastward. Are you sure that she sheered, or that the tug sheered to the westward? *A*. I am pretty positive that the barge sheered.

×-*Q*. 27. You don't know whether the tug sheered? *A*. The tug would be astern of the Berkshire after the Berkshire had passed.

×-*Q*. 28. Where was the barge with reference to Sabin's Point Light when this accident occurred? *A*. She was a little the other side of it.

×-*Q*. 29. A little north of it? *A*. Yes.

×-*Q*. 30. About abreast of it? Just a little north of being abreast? *A*. A little north.

×-*Q*. 31. How much north? *A*. Well, I won't say.

×-*Q*. 32. How close was she to the light? *A*. I couldn't tell you that.

×-*Q*. 33. You have told us what the length of this hawser line was — *A*. She was off from the light.

×-*Q*. 34. How far? *A*. I couldn't tell you how far that buoy lies from the light, because I don't know.

×-*Q*. 35. I asked you how far off the barge was. *A*. She lay there pretty close to the buoy.

×-*Q*. 36. Which buoy? *A*. The red buoy.

×-*Q*. 37. The red buoy north of Sabin's Point? *A*. Yes, sir.

×-*Q*. 38. You think she was pretty close up to that buoy? *A*. Yes, sir.

×-*Q*. 39. And where was the tug? *A*. Well, the tug might have been twice and a half the length of the steamer from her when they struck.

×-*Q*. 40. Which side did the Berkshire go down after she had backed clear of the barge? *A*. Which side did she go down?

×-*Q*. 41. Yes. *A*. After she backed clear of the barge?

×-*Q*. 42. Yes. *A*. She backed up on the same side that she came down on.

×-*Q*. 43. That is, she came down and came right out under the stern of the barge, didn't she? *A*. No, sir; when they hit she backed off, and the barge and the Berkshire parted. She backed up, and the towboat backed down — came down pretty close to the barge. She turned around and went back to Providence.

×-*Q*. 44. Who did? *A*. The Berkshire.

×-*Q*. 45. Didn't she go under the stern of the barge? *A*. Not that I noticed.

×-*Q*. 46. Were you looking? *A*. Yes, sir.

×-*Q*. 47. Are you positive that she didn't? *A*. Pretty positive that she didn't go under the stern of the barge.

×-*Q*. 48. Where was the Planet at that time? *A*. That I couldn't say.

×-*Q*. 49. Where was the Petrel? *A*. She was abreast of Sabin's Point.

×-*Q*. 50. The Planet you don't know about? *A*. I saw her after we got by the wreck; I saw her in Bullock's Point.

×-*Q*. 51. You were going down to Bullock's Point too? *A*. We were both heading for Bullock's Point.

×-*Q*. 52. You came down behind the Berkshire? *A*. Behind the Planet. The Berkshire was pretty near abreast of us.

×-*Q*. 53. You were inside of the buoy, were you? *A*. We were inside of the buoy; yes, sir.

×-*Q*. 54. You were to the eastward of the buoy? *A*. Yes, sir.

×-*Q*. 55. How much water did you draw? *A*. The Petrel draws about five feet.

×-*Q*. 56. Where were you when you heard this whistle that you speak of. *A*. Well, that was probably five minutes before the collision. We were up between Sabin's and Pomham Light.

PROOFS FOR NORFOLK & WESTERN RAILROAD COMPANY ET AL., NOW APPELLEES.

DEPOSITION OF GEORGE HAYWARD.

Direct Examination by Mr. Roelker.

Providence, March 15, 1894.

Q. 1. Mr. Hayward, please state your name, age and residence? *A.* George Hayward; Newfoundland.

Q. 2. How old are you? *A.* Twenty-five.

Q. 3. You were mate of the barge N. & W. No. 4 at the time of the collision in August last? *A.* Yes, sir.

Q. 4. How long had you been on the barge? *A.* About eighteen months, then.

Q. 5. I will ask you whether on the day of the collision, and before the collision, there was anything done to the hawser of the barge, and if so, what was it? *A.* It was shortened the day of the collision.

Q. 6. How long before the collision? *A.* About two hours.

Q. 7. Whereabouts? *A.* I cannot tell you the names of the places, but it was about five miles below Sabin's Point, as near as I can guess.

Q. 8. What was done with the hawser? *A.* We started to shorten it on the barge, and took in about three hundred feet.

Q. 9. On to the barge? *A.* Yes, sir.

Q. 10. And then your tug took in the remainder? *A.* Yes, until we had about fifty fathoms out.

Q. 11. How would that compare with the usual length of tow line used in going into harbor? *A.* That is about the usual length of tow line going into Boston, New York, Hell Gate, Norfolk, or anywhere.

Q. 12. Why is it necessary to have that length out? *A.* Well, so as to steer the vessel.

Q. 13. With any shorter, she would not steer? *A.* Well, the backwater from the tug's wheel would have a tendency to throw her from one side to the other.

Q. 14. Is she an easy vessel to steer? *A.* Any one that ever steered a vessel could steer her.

Q. 15. The hawser was shortened to the usual length? *A.* Yes, sir.

Q. 16. About fifty fathoms? *A.* Yes.

Q. 17. And did it continue so up till the time she was struck? *A.* Yes, sir.

Q. 18. Where were you at the time of the collision? *A.* Standing just forward of the house, between that and the mainmast.

Q. 19. Where had you been before that? *A.* In the engine room, and sometimes on deck.

Q. 20. Did you hear a whistle from your tug that day? *A.* Yes.

Q. 21. What kind? *A.* One long blast.

Q. 22. When you came on deck what did you see? *A.* I saw a steamer up the river, coming down; could not tell what steamer it was.

Q. 23. Subsequently proved to be the Berkshire? *A.* Yes, sir.

Q. 24. When this whistle was given where were the tug and tow? *A.* Just below the lighthouse.

Q. 25. Did the Berkshire answer this whistle? *A.* I never heard any answer.

Q. 26. When you came out and saw her there, where were the tug and tow? *A.* Very nigh abreast of the lighthouse.

Q. 27. The tug was? *A.* Yes.

Q. 28. And how close to the lighthouse? *A.* I should judge she was probably within seven hundred or eight hundred feet from the lighthouse; maybe a little more than that.

Q. 29. That was the tug? *A.* Yes.

Q. 30. How was the tow steering? *A.* Right after the tug.

Q. 31. Directly after? *A.* Yes, sir.

Q. 32. Was there any difference between the direction of the tug and the course of the tow? *A.* Not at that time.

Q. 33. Was there at the time of the collision? *A.* Just before the collision, when the tug saw it was not going to clear the steamer, she kept off to the westward. I could not say exactly the course, because I was not in the pilot house at the time; but as near as I can tell the course was about east northeast in the river.

Q. 34. Had the tug done anything about changing her speed? *A.* The tug had slowed down just about the time she got to the lighthouse.

Q. 35. How long before the collision? *A.* Probably five or ten minutes.

Q. 36. When she slowed down, what speed had she slowed down to? *A.* Three and a half or three miles an hour.

Q. 38. And the barge steered always directly behind her? *A.* Yes, sir.

Q. 39. Did the Berkshire answer this whistle from the tug? *A.* Not as I heard.

Q. 40. How far off was she when the whistle was given? *A.* Maybe half a mile off, probably a little more.

Q. 41. When you saw her coming down, how was she heading? *A.* The Berkshire, you mean?

Q. 42. Yes. *A.* Heading down a little to the eastward.

Q. 43. Did she change her course at all? *A.* Not as I could see until she was going to strike us. Then her head swung round a little.

Q. 44. How long was that before the collision? *A.* About two minutes.

Q. 45. How far off? *A.* Perhaps not more than one hundred and fifty feet.

Q. 46. Not more than that? *A.* Not when her head commenced to fall off.

Q. 47. How did she strike you? *A.* She struck us about three feet from the stem on the starboard bow.

Q. 48. How did she go into you? *A.* She struck on the starboard bow, and she came right in through, pretty nigh head on, and fetched up on the port side about forty feet be-aft of the stem.

Q. 49. How fast was the Berkshire going, should you think? *A.* As nigh as I could judge, about six or seven miles an hour.

Q. 50. Whereabouts — on which side of the channel were the tug and tow? *A.* On the eastward side.

Q. 51. Both of them? *A.* Yes.

Q. 52. How was the wind? *A.* Northward and eastward, light.

Q. 53. What kind of weather? *A.* Fine, clear, sunshiny.

Q. 54. What time did this occur? *A.* I should judge about three o'clock in the afternoon.

Q. 55. How was the tide running? *A.* Tide running head on, a little over half.

Q. 56. After the Berkshire struck the barge, what did she do? *A.* She backed out.

Q. 57. Backed out which side? *A.* Starboard side.

Q. 58. To the eastward? *A.* Yes, sir.

Q. 59. What did she do after she backed out? *A.* She backed out till she got just below us, then she slewed round and came up on the port side.

Q. 60. She went down between you and the light, and came back under your stern, and up to the westward? *A.* Up to the westward of us; yes, sir.

Q. 61. Was there any change made in the course of the barge, or in the wheel of the barge? *A.* I was not anywheres near the wheel, but as nigh as I can understand the captain told the man at the wheel to put the wheel hard a-starboard.

Q. 62. Did you hear the captain tell him that? *A.* No, sir.

Q. 63. You don't know what was done about that? *A.* No, sir.

Q. 64. Suppose that the steamer had kept along straight, instead of turning to the starboard as she did just before the collision, would she have struck you? *A.* Well, she might have rubbed our side, but she would not have struck us head on.

Q. 65. If she had held her course you think she might have rubbed against you? *A.* She might have rubbed against us, and that is all, I think.

Q. 66. Would she have had water enough to go there? *A.* Yes, sir; there was plenty of water.

Q. 67. Plenty of water on the eastward side? *A.* Yes, sir.

Q. 68. How was it on the westward side? *A.* There was two thirds of the water on the westward of us.

Q. 69. Was there anything to prevent her going to the westward in accordance with the signal the tug gave her? *A*. Nothing whatever.

Q. 70. Was there time enough for her? *A*. Lots of time before she got down to us.

Q. 71. If he had kept to the westward would the collision have been avoided? *A*. Yes, sir.

Q. 72. If he had stopped could the collision have been avoided? *A*. If he had stopped the collision would have been avoided.

Q. 73. Was there room for him to stop? *A*. Up above there where he was I would not say whether there was room for him to stop or not.

Q. 74. How did the barge sink? *A*. She went down head first.

Q. 75. How near to the place where she was struck? *A*. Probably half the width of herself.

Q. 76. Which way? *A*. To the westward; maybe her width, I could not say exactly.

Q. 77. How much headway did the barge have when the collision occurred? *A*. The barge was going probably two miles an hour, or two and a half.

Q. 78. How fast was the steamer going when the collision occurred? *A*. The steamer was going six or seven miles an hour at the time the collision occurred, as near as I can judge.

Q. 79. You were standing up forward, between the cabin and the mainmast. On which side? *A*. Starboard side.

Q. 80. You had a clear and unobstructed view of it? *A*. Yes, sir.

Q. 81. What is the width of the barge? *A*. Could not say exactly.

Q. 82. As near as you can tell? *A*. As near as I can tell her width is somewhere about thirty-five or thirty-eight feet.

Q. 83. And you think she lies, or did lie, thirty-five feet to the westward of where the collision occurred? *A*. Yes, sir.

Q. 84. You know the point where she did lie? *A*. Yes, sir.

Q. 85. You put lights up there some time after? *A*. Yes, twelve nights I was there.

Q. 86. You think that the point where she sunk and lay on the bottom was probably within a width of her to the westward, and half her length to the southward, of where she struck? *A.* Yes, sir.

Q. 87. What is her length? *A.* One hundred and ninety-eight feet on the keel.

Q. 88. How much water did she draw? *A.* About eighteen feet six inches.

Q. 89. Is that aft? *A.* Aft, yes. About seventeen feet forward.

Q. 90. How was she loaded? *A.* She had eighteen hundred tons at that time.

Q. 91. Of what? *A.* Coal.

Q. 92. Is there anything that you could have done to avoid the collision? *A.* No, sir.

Q. 93. Have you seen any other barges and tows and large vessels go up there since the collision? *A.* Yes, sir; several tows.

Q. 94. How far to the westward have you seen them go? *A.* I seen a tug and two barges go up about five hundred (500) feet to the westward of that barge where she was sunk.

Q. 95. Do you know the draught? *A.* Between seventeen and eighteen feet. The same company's barges as this one.

Cross Examination by Mr. Carver.

×-*Q.* 96. How many men did you have aboard of this barge? *A.* Five.

×-*Q.* 97. Was it your watch on deck at that time? *A.* Yes; we were all on deck.

×-*Q.* 98. Who was at the wheel? *A.* One of the sailors.

×-*Q.* 99. Do you know his name? *A.* John Elies.

×-*Q.* 100. Was there anybody on the lookout? *A.* Yes.

×-*Q.* 101. Who was? *A.* We were all forward there, standing on deck.

×-*Q.* 102. This man at the wheel could not speak English very well? *A.* Not dreadful well; no sir.

×-*Q.* 103. Could he understand? *A.* Yes; he understood all right, and I could understand him.

×-*Q.* 104. How long had he been with you? *A.* I could not say that; about eight or nine months.

×-*Q*. 105. How long was this hawser that you had out originally between you and the tug? How many fathoms? *A*. One hundred and seventy-five fathoms was the total length of the hawser.

×-*Q*. 106. Then when you got up here you say you took in three hundred feet? *A*. Just about three hundred feet.

×-*Q*. 107. Who had charge of taking in the hawser? *A*. The captain did.

×-*Q*. 108. Did you take particular notice of how much was taken in? *A*. As nigh as I can guess — I can guess within ten or fifteen feet.

×-*Q*. 109. But you could not guess the length of tow line, looking at it from the barge, as you could from a point directly across? *A*. Not quite as well, but you could guess the length pretty well.

×-*Q*. 110. How do they take it in? *A*. With a steam capstan.

×-*Q*. 111. Had you ever towed up Providence River before this? *A*. Yes.

×-*Q*. 112. Many times? *A*. Once.

×-*Q*. 113. Only once. And you yourself at the time did not know much about the width of the channel? A. Not at the time, no, sir.

×-*Q*. 114. So that what you have learned about it is since. You are on this same barge still? *A*. Yes, sir.

×-*Q*. 115. You stated that just before the collision there was a change in the course of the tugboat. Was that change to the eastward or to the westward, that is, more toward the other side of the channel? *A*. More to the westward; it tried to clear the steamer.

×-*Q*. 116. Have you ever been on steamers? *A*. Yes, sir.

×-*Q*. 117. On propellers? *A*. Yes, sir; all kinds of steamers.

×-*Q*. 118. When a steamer, a propeller, is backing full speed, if her propeller is a right-handed propeller, it throws her head a-starboard, doesn't it? *A*. I don't know much about engines on steamers. When I have been on steamers I have been sailor on them.

×-*Q*. 119. Do you say you saw the Berkshire swerve to the westward just before the collision took place? *A*. Yes, sir.

×-*Q*. 120. Don't you know that was caused by reversing her engines? *A*. It might be; I could not say that.

×-*Q*. 121. You don't know whether it was or not? *A*. Would not say.

×-*Q*. 122. You think if the Berkshire had kept on her course there would have been no collision? *A*. She might have rubbed our side, but not done much damage.

×-*Q*. 123. If your steamer had kept hard a-starboard would there have been any collision? *A*. I think there would have been; loaded the way she was she won't answer her wheel so quickly as a steamer will.

×-*Q*. 124. If you had put your wheel hard a-starboard it would have had a tendency to have avoided the collision? *A*. As far as I can understand, it was hard a-starboard.

×-*Q*. 125. When the collision took place you was not heading the same way that the tugboat was, was you? *A*. Very near it.

×-*Q*. 126. Were you more to the eastward or to the westward? *A*. A little more to the eastward.

×-*Q*. 127. In other words, if you had been directly behind the tugboat there would have been no collision? *A*. Yes, sir; we would have been struck somewheres about the main rigging then.

×-*Q*. 128. You think it was two minutes before the collision that the Berkshire changed to the westward? *A*. About that.

×-*Q*. 129. That is your opinion? *A*. That is my opinion; yes, sir.

×-*Q*. 130. The tide was going down stream that time? *A*. Yes, sir.

×-*Q*. 131. How fast do you think it was going? *A*. There is not much tide in this river; about a mile and a half running ahead.

×-*Q*. 132. It runs swifter where you were than at any other point? *A*. I don't know; it might run a little swifter round that turn.

×-*Q*. 133. You think when you saw the course of the Berkshire change, she was not more than one hundred and fifty feet off? *A*. No, sir; she was not over that.

×-*Q*. 134. During all this time you were going ahead? *A*. Going ahead slowly; yes, sir.

×-*Q*. 135. Where was the captain? *A*. On deck at the time.

×-*Q*. 136. Where on deck? *A*. Couldn't say exactly the place; at the time she struck, the captain was forward.

×-*Q*. 137. Where were you when you heard the whistle that you spoke about? *A*. Down in the engine room.

×-*Q*. 138. Down below? *A*. Down below, forward.

×-*Q*. 139. Do you mean to say that you can hear whistles down there so as to know what whistles they are? *A*. Yes, sir; that tugboat's whistle, I know it wherever I hear it.

×-*Q*. 140. You don't know what she was whistling to? *A*. No, sir; I knew it was some steamboat she was whistling to.

×-*Q*. 141. How long after that was it when you came on deck? *A*. Not more than two or three minutes.

×-*Q*. 142. And when you came on deck you thought your barge and the Berkshire were about half a mile apart? *A*. About that.

×-*Q*. 143. How fast was your tug going? *A*. About two and a half miles an hour.

×-*Q*. 144. You mean over the land? *A*. I mean going through the water.

×-*Q*. 145. How much do you think the tide was running? *A*. About a mile and a half.

×-*Q*. 146. She was going up the river about two and a half miles an hour? *A*. The tide was going along by the barge; the barge was making about two and half miles headway an hour.

×-*Q*. 147. You think the Berkshire, at the time of the collision, was making six or seven miles an hour? *A*. That is, over the land; yes, sir.

×-*Q*. 148. If the Berkshire had gone on the westward side of the channel it would have been necessary to have crossed the bow of the tug? *A*. Yes, sir.

×-*Q*. 149. You don't consider it good seamanship to cross the bow of a vessel? *A*. Cross her bow? She would not have had to cross her bow if she had altered her course when the signal was given.

×-*Q*. 150. You say you are acquainted with steamers? *A*. Yes, sir.

×-*Q*. 151. And this Berkshire was on your starboard side, was not she? *A*. Yes, sir.

×-*Q*. 152. And the vessel that holds the other vessel on the starboard side is the one to get out of the way, is it not? *A*. I could not say about that.

Direct Examination resumed by Mr. Roelker.

×-*Q*. 153. You say that you had her on the starboard side; that is, when the whistle was given? *A*. Yes, sir.

×-*Q*. 154. And at that time you were below Sabin's Point Light? *A*. Yes, sir.

DEPOSITION OF JOHN NIELSON.

Direct Examination by Mr. Roelker.

Q. 1. Mr. Nielson, you were on board the barge N. & W. No. 4? *A*. Yes, sir.

Q. 2. What was your business on her? *A*. Cook.

Q. 3. Where were you just before the collision? *A*. I was on deck.

Q. 4. Do you know anything about the the tow line having been shortened before the collision that day? *A*. Yes, sir.

Q. 5. Whereabouts was that? *A*. Two or three miles out there.

Q. 6. Was it before the collision? *A*. Yes, sir.

Q. 7. And what did you do? *A*. Shortened the hawser; then the engine broke down in the barge; then the engineer for the tug had to come over and fix that.

Q. 8. What did the tug do? *A*. She shortened the rest of the hawser.

Q. 9. How short did they get the hawser before they got through? *A*. Oh, about fifty or sixty fathoms.

Q. 10. Was that the length of the hawser when the collision occurred? *A*. Yes, sir.

Q. 11. About fifty to sixty fathoms? *A*. Yes, sir.

Q. 12. How did that hawser compare with the usual length of hawsers in going into port? *A*. It is the same length used for other places.

Q. 13. Where do you use it? *A*. We use it in New Haven and here, and Boston and every place.

Q. 14. Through Hell Gate? *A*. Yes, sir.

Q. 15. That is the regular length that you use? *A*. Same length; yes, sir.

Q. 16. Did you hear any whistles from the tug that day before the collision? *A*. Yes, sir.

Q. 17. What sound did you hear? *A*. One long whistle.

Q. 18. Where were you when that was given? *A*. On deck.

Q. 19. And whereabouts was the tug in the river? *A*. The tug was right ahead of us.

Q. 20. Whereabouts, with reference to Sabin's Point lighthouse? *A*. A little below.

Q. 21. And you were steering along directly behind her? *A*. Yes, directly behind her.

Q. 22. Did you see the steamer Berkshire at that time? *A*. Yes, sir.

Q. 23. Where was she? *A*. A little ahead of us in the river.

Q. 24. About how far off? *A*. Half a mile or three quarters.

Q. 25. Did she answer the whistle? *A*. No; I didn't hear no whistle.

Q. 26. How fast was she going? *A*. Six or seven knots an hour.

Q. 27. How was she heading? A. I could not say how she was heading. She was coming directly towards us.

Q. 28. How near to the lighthouse was the tug when she passed it? *A*. Three hundred or four hundred feet; could not say exactly.

Q. 29. When the collision occurred, the tug had got by the lighthouse, hadn't she? *A*. I don't think she had got by it; not much. We were just abreast of it.

Q. 30. And the tug was ahead of you. How were you steering behind the tug? *A*. Right straight on.

Q. 31. Did the tug change her course at all? *A*. I didn't see that.

Q. 32. What was the order that he gave? *A*. Put the wheel hard a-starboard.

Q. 33. Who was at the wheel? *A*. John Elies. Then he gave me the order to go in and help him.

Q. 34. Where were you with reference to the pilot house? *A.* Fore part of the house.

Q. 35. How far from there to the pilot house? *A.* Three or four steps.

Q. 36. You stepped into the pilot house? *A.* Yes, sir.

Q. 37. When you got there how did you find the wheel? *A.* I found it a little over to starboard, but not hard over. I helped him put it hard over. When we got it hard over the Berkshire struck her.

Q. 38. Did you see her change her course? *A.* He backed down again.

Q. 39. The Berkshire came down, and came back up again past the tug? *A.* He didn't pass the tug, he came right into us.

Q. 49. Where did he strike you? *A.* Starboard bow.

Q. 41. Did you see the Berkshire change her course before she struck you? *A.* Yes; I guess he was trying to get between the tug and us.

Q. 42. Which way? *A.* To the westward.

Q. 43. If he hadn't changed his course could he have gone down between you and the lighthouse? *A.* Plenty of room.

Q. 44. How far were you from the lighthouse? *A.* Three hundred or four hundred feet; plenty of room.

Q. 45. Did you see the barge after she was raised? *A.* Yes.

Q. 46. How did he come into you? Where did he strike? *A.* In the starboard bow.

Q. 47. How far from the stem? *A.* Pretty close to the stem. I know there was nothing left only the stem.

Q. 48. Did you see the marks made by him on the inside of your vessel? *A.* On the port side; yes.

Q. 49. How far back of the stem did that go? *A.* About thirty-seven feet.

Q. 50. Will you look at this photograph, if you please. You have seen the barge since she was raised? *A.* Yes, sir.

Q. 51. Is that correct? *A.* Yes, sir; that is correct.

[*Photograph of barge put in, and marked* "Exhibit E".]

Q. 52. What did the Berkshire do? *A.* Backed out.

Q. 53. Which way? *A.* Toward the lighthouse.

Q. 54. Stern foremost? *A.* Yes, sir.

Q. 55. When he got back, which way did he turn? *A.* He turned ahead again and went down stream.

Q. 56. Which way did he pass? *A.* Starboard side.

Q. 57. Then what did he do? *A.* Swung round and came up the river again.

Q. 58. On the west side of you? *A.* Yes; on the west side of us.

Q. 59. You have been in barges before? *A.* Yes, sir; been six weeks on the Lackawanna barges, and six weeks in the Boston barges. Have been in this one here fourteen months.

Q. 60. Before that, you were in others how long? *A.* About three months I have been in barges before, altogether.

Q. 61. How fast was the tug going at the time of the collision? *A.* Going about two knots; two or three knots.

Q. 62. Did she slow up at any time? *A.* Yes.

Q. 63. When was that? *A.* Below the lighthouse.

Q. 64. Did you see the Berkshire at the time the whistle was given from the tug? *A.* Yes.

Q 65. Was there any room for the Berkshire to have come down on the west side of the tug and the tow, when the whistle was given? *A.* Oh, yes, when the whistle was given; I don't know about the channel, but I think there was plenty of room.

Q. 66. How fast was the Berkshire going? *A.* Six or seven knots.

Q. 67. It seemed to you she was going at that rate? *A.* That is the way it looked to me.

Cross Examination by MR. CARVER.

×-*Q.* 68. You say that you shortened the hawser some, and then the engine broke down? *A.* Yes, sir.

×-*Q.* 69. Where were you when the hawser was being shortened? Were you on deck or below? *A.* I was helping them.

×-*Q.* 70. Then after that you say that the tug took in some of the hawser? *A.* Yes, sir.

×-*Q* 71. How long is that hawser? Is it one hundred and eighty fathoms? *A.* Yes, sir; pretty near.

×-*Q*. 72. This was a little below Sabin's Point? *A*. Yes, sir.

×-*Q*. 73. There was nothing to prevent the tug from going alongside your barge, was there? *A*. No.

×-*Q*. 74. You say that when the Berkshire was about three quarters of a mile from you, that the tug blew one long blast of the whistle? *A*. Yes.

×-*Q*. 75. Are you sure it was a long blast? *A*. Sure.

×-*Q*. 76. Was not it a short blast? *A*. No, sir; it was long.

×-*Q*. 77. What called that blast to your attention? *A*. I know nothing about that, but I guess he blew for the Berkshire,

×-*Q*. 78. You didn't know what it was for, but that is what you thought it was? *A*. That is what I thought.

×-*Q*. 79. When the tugboat made the whistle did she make any change of course? *A*. No; steered after the tug.

×-*Q*. 80. You don't understand. When the tugboat sounded the whistle did she change her course any? *A*. No; I didn't see that.

×-*Q*. 81. She seemed to keep along just as she did before? *A*. Yes.

×-*Q*. 82. And the barge kept right along, did she? *A*. Yes, sir.

×-*Q*. 83. The only change of course you ever made on the barge was when you put your helm hard a-starboard? *A*. Yes; hard a-starboard.

×-*Q*. 84. You were heading right across the channel? *A*. No.

×-*Q*. 85. Do you know how you were heading? *A*. Yes.

×-*Q*. 86. What was your course? *A*. No.

×-*Q*. 87. You don't know about the course? *A*. I know we were on the east side of the channel.

×-*Q*. 88. The tug was right ahead of the barge? *A*. Yes.

×-*Q*. 89. She was on the east side too? *A*. Yes.

×-*Q*. 90. Heading right up stream? *A*. Right up.

×-*Q*. 91. Did you see the Berkshire try to stop? *A*. No.

×-*Q*. 92. As far as you could see, she came right along the way she did before? *A*. Yes, sir.

DEPOSITION OF JOHN ELIES.

Direct Examination by Mr. **Roelker**.

This man not being able to speak the English language, his testimony is taken through an interpreter, F. P. **Clemens**, of Providence.

Q. 1. Were you on the barge at the time of the collision? *A.* Yes, sir.

Q. 2. Do you remember where the hawser was shortened that day? *A.* Yes, sir.

Q. 3. How long before the collision was it, do you think? *A.* Somewhere about one o'clock they shortened hawser.

Q. 4. How much of the hawser did you take in on the barge? *A.* About one third.

Q. 5. What happened then? *A.* Something happened in the engine room.

Q. 6. What, if anything, was done about taking in any more of the hawser? *A.* They went to look at it and see what was the matter.

Q. 7. Was any more hawser taken in on the barge? *A.* The engineer from the tugboat came to fix the engine.

Q. 8. Was any of the hawser taken in on the towboat? *A.* Yes, sir; the towboat took some in.

Q. 9. How long was the hawser between the tugboat and the tow after they had taken it in? *A.* About the length of the barge, between the towboat and the barge.

Q. 10. Was it the usual length in towing in harbors? *A.* The same length that we used in towing into New Haven or Boston.

Q. 11. Where were you on the barge when the collision took place? *A.* At the wheel in the pilot house.

Q. 12. How long had you been at the wheel? *A.* I went soon after dinner; about 12.30.

Q. 13. How far away was the Berkshire when you first saw her? *A.* About a mile and a half, or two.

Q. 14. Did you hear the tug give any signal with her whistle? *A.* Yes, sir.

Q. 15. What signal did she give? *A*. One blast.

Q. 16. Where was the tug when she gave that blast, with reference to Sabin's Point lighthouse? *A*. Just about the light; just passing the light.

Q. 17. Where was the Berkshire when the whistle was given? *A*. He was a little past the red lighthouse.

Q. 18. Did the Berkshire answer the whistle? *A*. No.

Q. 19. How close to the lighthouse did the tugboat pass? *A*. forty or fifty feet.

Q. 20. After passing the lighthouse, how did the tug head? *A*. Right straight up north.

Q. 21. How did the barge steer after the tug? *A*. Steered the same as the towboat.

Q. 22. Did you see the towboat change her course, before the collision? *A*. I didn't notice her changing her course; I steered right after.

Q. 23. Did you receive any order from the captain before the collision? *A*. The captain gave me the orders.

Q. 24. What order did he give you? *A*. Told me to put the wheel hard a-starboard.

Q. 25. How far off was the steamer when you got that order? *A*. About thirteen or fourteen fathoms, as near as I can guess.

Q. 26. Did you put the wheel hard a-starboard when you got the order? *A*. Yes, sir.

Q. 27. Did anybody go into the pilot house to help you? *A*. Yes.

Q. 28. Who was it? *A*. The cook.

Q. 29. Do you know his name? *A*. John Nielson.

Q. 30. Did you see the Berkshire turn to the westward, and toward the barge, shortly before the collision? *A*. He turned right towards the barge.

Q. 31. How far off was it when it turned toward the barge? *A*. It was thirteen or fourteen fathoms when the Berkshire turned towards us.

Q. 32. How fast was the Berkshire coming towards you when it struck you? *A*. About two miles an hour, or two and a half.

Q. 33. How fast was the tugboat going? *A*. About two miles.

Q. 34. Where did the Berkshire strike the barge? *A.* On the left side abaft the hawse pipe, near the stem. Just where they hoist the anchor up.

Q. 35. On which side? *A.* Starboard side.

Q. 36. After the accident what did the Berkshire do? *A.* He backed out and went round the stern.

Q. 37. On which side of the barge did he go down when he went down? *A.* He went down on the right, and came round under her stern.

Cross Examination by Mr. CARVER.

×-*Q.* 38. Where do you come from? *A.* From Fiuma.

×-*Q.* 39. How long have you been in this country? *A.* One year.

×-*Q.* 40. You had been how long in this country when this collision took place? *A.* Six months.

×-*Q.* 41. How long had you been on the barge? *A.* Three months and ten days.

×-*Q.* 42. Did the Berkshire turn round after the collision? *A.* He backed and went ahead again.

×-*Q.* 43. Did the Berkshire go further down stream than the barge was after the collision? *A.* He passed close to the barge, round its stern, and went up on the other side.

×-*Q.* 44. On which side of the barge did he go, on the east or the west? *A.* He went from the right side to the left of the barge.

×-*Q.* 45. After the barge was hit, did they both go down together with the tide before the barge sank? *A.* No.

×-*Q.* 46. Did the barge go down stream after she was struck and before she sank? *A.* Yes.

×-*Q.* 47. How many times her length did she go down stream before she sank? *A.* She could not go very far; about two or three fathoms, three or four at the most.

×-*Q.* 48. Wasn't it about twenty minutes from the time the barge was struck until she sank? *A.* She went down in about ten minutes.

×-*Q.* 49. What did the tugboat do after the collision took place? *A.* Hauled in the hawser, and stood along outside of her.

×-*Q*. 50. Did she go on the port side of the barge when she sunk? *A*. On the port side.

×-*Q*. 51. Was the head of the barge turned to port right after the collision? *A*. I didn't look at the compass; I was steering after the towboat.

×-*Q*. 52. Couldn't you see, after the collision, that the barge swung towards the port? *A*. When the steamer struck her she went to the westward and back a little. Her stern went towards the lighthouse, to the eastward.

×-*Q*. 53. And the bow went towards the westward? *A*. Yes, sir.

×-*Q*. 54. How did the barge head at the time of the collision? *A*. I didn't look at the compass; I steered after the towboat.

×-*Q*. 55. Was not the barge headed across the river at the time of the collision? *A*. It was headed right up towards the city.

×-*Q*. 56. The Berkshire was always on the starboard side of the barge, was she not? *A*. Yes, sir; she was so, always.

×-*Q*. 57. How many points was the Berkshire on the barge's starboard bow when you first saw her? *A*. He was right straight ahead. I don't understand about the points of the compass.

×-*Q*. 58. At the time of the collision was the barge heading as much as four points from what would be the opposite direction to the way the Berkshire was going? *A*. He was keeping away from her.

×-*Q*. 59. Would the Berkshire have gone under the stern of the barge, provided the barge had been going a little faster than she was? *A*. She would have struck in the middle.

×-*Q*. 60. Did the tugboat stop her engines and deaden the headway of the barge before the collision? *A*. Yes, sir; as soon as the towboat stopped the speed, the barge stopped a little.

×-*Q*. 61. Did the stopping of the towboat slacken the hawser between the towboat and the barge? *A*. Yes, sir; when he saw the steamer run into the barge he let go, — slacked up.

×-*Q*. 62. Where was the captain of the barge when he gave you the order about the wheel? *A*. Alongside the cabin, on deck.

×-*Q*. 63. As I understand it, the tugboat didn't stop until just as the Berkshire and the barge came together? *A*. He stopped at the time, and hauled in the hawser.

Direct Examination resumed by Mr. Roelker.

Q. 64. Did the Berkshire have room enough to have passed to the eastward of the barge? *A.* Oh, yes.

Cross Examination resumed by Mr. Carver.

×-*Q.* 65. Do you know how wide the channel is there? *A.* Don't know how wide the channel is, but I know it was about forty fathoms from the lighthouse to the barge.

×-*Q.* 66. Is that to the stern of the barge? *A.* The whole of the barge.

Direct Examination resumed by Mr. Roelker.

Q. 67. That is, the lighthouse was forty fathoms to the east of the barge? *A.* Yes, sir.

Q. 68. If the Berkshire hadn't turned, but had kept straight along, could she have passed the barge to the eastward? *A.* He could have passed all right.

Cross Examination resumed by Mr. Carver.

×-*Q.* 69. Do you know how much water there was between it and the lighthouse? *A.* Don't know anything about that.

×-*Q.* 70. You can simply say that there was water enough for the Berkshire to pass between? *A.* There was water enough, because the water was level with the rattan of the barge.

×-*Q.* 71. But you don't know how the bank slopes there? *A.* No, sir.

DEPOSITION OF CHARLES F. BURNETT.

Direct Examination by Mr. Roelker.

Q. 1. What is your full name, age, residence and occupation? *A.* Charles F. Burnett; forty-two years of age; residence, New Haven; occupation, master.

Q. 2. You were captain of this barge N. & W. 4 at the time of the collision? *A.* Yes, sir.

Q. 3. How long had you been captain of her? *A.* A little over three years.

Q. 4. Had you had experience in other barges before? *A.* Not in barges; no, sir.

Q. 5. In other vessels? *A.* Yes; sailing vessels.

Q. 6. And you are still captain of her? *A.* I am; yes, sir.

Q. 7. What, if anything, was done about the hawser that day before the collision? *A.* We shortened hawser about six miles below Sabin's Point. We had taken in about a third when our engine gave out.

Q. 8. How long was the hawser? *A.* One hundred and seventy five fathoms.

Q. 9. You had the whole of that hawser out? *A.* We had, sir.

Q. 10. Until you shortened it? *A.* Yes, sir.

Q. 11. So that it was all wet? *A.* Yes, sir.

Q. 12. Tell us what kind of hawser it was. *A.* Ten-inch manila hawser.

Q. 13. How many ply? *A.* Three strand.

Q. 14. You took in about one third of it? *A.* About that.

Q. 15. Did you measure how much? *A.* Not at that time.

Q. 16. Afterwards? *A.* Yes, sir; after the barge was raised.

Q. 17. How much had you on board the barge? *A.* Three hundred and ten feet.

Q. 18. Where was the hawser parted? *A.* It was parted at the bitts, by the Berkshire's bow.

Q. 19. What happened then? *A.* The engine broke; we signalled to the tug that we could not hawl in any more hawser, and they sent the chief engineer on board to repair the engine. He found he could not repair it, and they took in the rest of the hawser on board the tug. We hauled it in to the usual length used in towing into harbors.

Q. 20. How much is that? *A.* About fifty fathoms.

Q. 21. What is the custom in towing barges along the Atlantic coast?

Mr. Carver. I object to that.

A. Going into harbors?

Q. 22. Yes. *A.* We always shorten in going into harbors until we get about fifty fathoms.

Q. 23. Is that the general custom? *A.* I presume it is.

Q. 24. Could you make it any shorter? *A.* No, sir; it would bring the barge so close to the quick-water of the tug that she would be liable to sheer.

Q. 25. What load did you have on? *A.* Seventeen hundred and sixty tons.

Q. 26. What was the draught of the tug? *A.* Fourteen feet.

Q. 27. Into what harbors has it been your custom to tow with this line? [*Objected to by* Mr. CARVER.] *A.* Boston, New Haven, and Portland, Me. Going into New York we generally shorten up at the Narrows. We tow through Hell Gate with the same length.

Q. 28. Had you towed any into Providence this way before? *A.* Yes, sir.

Q. 29. After you had shortened this hawser, did you at any time hear the tug give a signal with their whistle? *A.* Yes, sir.

Q. 30. Where was the tug when she did that? *A.* A little south of Sabin's Point Light.

Q. 31. What signal did she give? *A.* She blew one long blast.

Q. 32. Did you look up the river then? *A.* I did.

Q. 33. What vessel, if any, did you see? *A.* I saw a steamer coming down the river. I didn't know what it was.

Q. 34. It subsequently proved to be the Berkshire? *A.* Yes, sir.

Q. 35. Where was she when you first saw her? *A.* She was pretty well up above the black buoy, near the other light, Pomham; could not locate it exactly head on, you know.

Q. 36. It was in the vicinity of Pomham Light. How far distant should you say that was? *A.* I should say it was fully a mile.

Q. 37. She was heading down? *A.* Yes, sir; coming down stream. She was heading down from the light. We could see her to the eastward of Sabin's Point Light when the signal blew.

Q. 38. And she was then over your starboard bow? *A.* Yes, sir.

Q. 39. Did she make any answer to this signal? *A.* I didn't hear any.

Q. 40. Should you have heard it, do you think, if she had given any? *A.* Without a doubt; yes, sir.

Q. 41. How was the weather? *A.* Fine weather. Light wind to the north and eastward.

Q. 42. How was the tide? *A.* Ebb tide.

Q. 43. What time was this? *A.* Close on three o'clock.

Q. 44. After the tug gave the whistle what did she do, if anything, with reference to her speed? *A.* She slowed down shortly after that.

Q. 45. When she slowed down where was she? *A.* About abreast of the light.

Q. 46. To what speed did she slow? *A.* I should suppose we were making probably, after we rounded the light, two and one half or maybe, three knots an hour.

Q. 47. How close to the lighthouse did she run? *A.* Might say five hundred or six hundred feet, with safety.

Q. 48. How was your barge steering with reference to the tug? *A.* Steering directly after her.

Q. 49. After she rounded the light, how did she head? *A.* Near about north.

Q. 50. Directly up the channel? *A.* Almost.

Q. 51. Which side of the channel? *A.* To the eastern edge of the channel.

Q. 52. When the collision occurred whereabouts had you got? *A.* We were just about abreast of the light. We might have been a very little beyond it.

Q. 53. Just about abreast of the light? *A.* Yes, sir. Sabin's Point Light.

Q. 54. How far to the westward of it? *A.* Not over five hundred of six hundred feet.

Q. 55. Did you see the tug at any time change her course? *A.* I did; yes, sir.

Q. 56. How long was that before the Berkshire came up to her? *A.* She changed her course to avoid being run over. She was heading up, and she headed a little to the westward.

Q. 57. How fast was the Berkshire going at that time? *A.* I should judge she was making six knots through the water.

Q. 58. How close did the Berkshire pass to the tug? *A.* I could not say as regards that; I should say she passed within fifty or seventy-five feet.

Q. 59. When you saw the tug head to the west, what did you do? *A.* I told the man to starboard the wheel, hard a-starboard.

Q. 60. Did you send him any assistance? *A.* I did.

Q. 61. Who did you send? *A.* Sent him John Nielson, who was standing close by.

Q. 62. After the Berkshire passed the tug, did you notice any change in her course? *A.* When she was about one hundred feet from us her head fell to the westward. That was, I suppose, on account of reversing her engines.

Q. 63. Did you notice that she had reversed her engines? *A.* I did.

Q. 64. You first noticed the quick-water round the wheel, then? *A.* Yes, sir.

Q. 65. That seemed to sway her head over to you? *A.* Yes, sir.

Q. 66. Now, if she hadn't reversed her engines, but had kept straight on her course, would she have struck you? *A.* I think if she had kept her wheel hard a-starboard, she might probably have hit us a glancing blow alongside.

Q. 67. Was there water enough to the eastward of you for her to pass? *A.* Yes, sir.

Q. 68. He would draw how much? *A.* About sixteen feet.

Q. 69. Where did he strike you? *A.* Struck us on the starboard bow, about two or two and a half feet from the stem.

Q. 70. What damage did he do? *A.* Ran into us and went through till his bow brought up on our port side about thirty-seven feet from the stem.

Q. 71. And you are in command of the vessel now? *A.* Yes, sir.

Q. 72. Are the marks on her? *A.* Still on her.

Q. 73. Will you examine that photograph? Did you have that taken? *A.* No, sir.

Q. 74. Is that a correct picture of the way she lay? *A.* That is as she lay in the dry dock.

Q. 75. At the time when the signal was given for her to pass to port, he was a mile off? *A.* I think she was.

Q. 76. Was there time enough and room enough for her to keep to the westward? *A.* Ample time and room. She could have avoided a collision by stopping when she found she was coming in close contact with the tug.

Q. 77. You say she did not reverse her engines until she was close on to you? *A.* The first time I noticed the quick-water was at that time; she was going along at the rate of about six knots an hour.

Q. 78. Was there anything that you could have done to avoid this collision that you did not do? *A.* Nothing, sir.

Q. 79. Have you made a diagram of the way in which she struck you? *A.* Yes, sir.

Q. 80. Will you please produce it? *A.* I made one when she was on the dry dock, showing the cut that was in her.

[*Diagram produced and marked* "Exhibit P".]

Q. 81. B to A is the course which the Berkshire appeared to be taking as she came down the river, about south by west. When she got to the point C she changed her course. That you think was about one hundred feet from the barge. She then ran on the course C to D, and that brought her into collision with you at the point E, two and a half feet from the stem on the starboard side of the barge. *A.* Yes, sir.

Q. 82. The force of the collision had a tendency to throw your bow a little to the westward? *A.* Yes, sir; it settled the bow to the westward.

Q. 83. How much? *A.* I suppose it might have slewed her over half her width.

Q. 84. What is her width? *A.* Thirty-nine feet six inches.

Q. 85. F shows the position, five feet out of shape, to which the stem of the barge was pressed after the collision. You think that the barge was slewed one half of her width, which is thirty-nine feet, to the westward by the force of the collision before she sank? *A.* Yes, sir; she drifted astern. The blow had a tendency to settle her to the westward and astern at the same time.

Q. 86. How much astern? *A.* She probably drifted half her length.

Q. 87. The position she was in then was about half her width to the westward, and half her length to the southward? *A.* Yes, sir; her bow went down pretty quick, and she filled at the stern later on.

Q. 88. How long before she became entirely submerged? *A.* Ten minutes.

Q. 89. How long before her bow went down? *A.* I don't suppose it was over two minutes.

Q. 90. What did the Berkshire do? *A.* She backed astern.

Q. 91. Backed clear of you? *A.* Yes, sir.

Q. 92. How much? *A.* Fully her length.

Q. 93. In what direction? *A.* To the eastward.

Q. 94. Due east? *A.* Between east and northeast. Then she came ahead and came down between us and the light.

Q. 95. To the eastward of you, between you and the light? *A.* Yes, sir.

Q. 96. Did she have any difficulty in getting through there? *A.* Didn't seem to.

Q. 97. Didn't get aground? *A.* No, sir.

Q. 98. She rounded under your stern? *A.* Yes; considerably below us.

Q. 99. And came up to the westward? *A.* Yes, sir.

Q. 100. Was there any room for her to have gone to the westward of you? *A.* Plenty of room.

Q. 101. And plenty to go to the east? *A.* He seemed to have.

Q. 102. Have you observed the steamers going up and down the river? *A.* I did when I was on the wreck after that.

Q. 103. The regular course is to the westward of where you sank? *A.* Yes, sir.

Q. 104. What was the course of the tug just before she changed her course, as you have testified, to escape the Berkshire? *A.* It was about north.

Q. 105. About due north? *A.* Yes, sir.

Q. 106. She didn't change her course, then, from the time she rounded the lighthouse? *A.* No, sir.

Q. 107. How long was your barge? *A.* One hundred ninety-eight feet on the keel.

Mr. CARVER. You might ask how much over all.

A. I think she was about eight feet hang.

Cross Examination by Mr. CARVER.

×-*Q.* 108. You don't know how your barge headed by compass at the time of the collision, do you? *A.* Yes, sir, I do.

×-*Q.* 109. Did you use the compass? *A.* I did.

×-*Q.* 110. And she was heading how? *A.* She was heading about north.

×-*Q.* 111. Where were you at the time? *A.* I was in the pilot house with Elies until I saw the ship was going to run into us. Then I sent another man in. We invariably have two men at the wheel.

×-*Q.* 112. Steers pretty hard, don't she? She does not, no, sir. When she is deeply loaded and goes round a curve she is, perhaps, a little.

×-*Q.* 113. How were you heading? *A.* We were heading directly after the tug.

×-*Q.* 114. And you were making that curve? *A.* No, sir; we had made the most of it.

×-*Q.* 115. But you were still making the curve? *A.* Yes, sir.

×-*Q.* 116. Then your barge, while it was making the curve, would head more to the eastward? *A.* Yes, sir; as we were running to the eastward.

×-*Q.* 117. You were heading more to the eastward than the tug was? *A.* No, sir; I think we were heading directly after the tug.

×-*Q.* 118. If you were heading directly after the tug, and the only change was the change the Berkshire made — *A.* No; the tug kept off.

×-*Q.* 119. I understood you to say that you were heading directly after the tug? *A.* Yes, sir.

×-*Q.* 120. If you have a tow line of considerable length, with a tug ahead, it is pretty hard work to swing the barge at once, isn't it? *A.* Yes, sir; it is.

×-*Q.* 121. If you have a tug alongside, you can swing the barge much more readily than if it is ahead? *A.* No, it amounts to about the same thing.

×-*Q.* 122. You don't think that with a tug alongside of your barge, that your barge will swing any quicker than she will with a tug ahead? *A.* No sir; I do not.

×-*Q.* 123. Have you ever come up Providence River with a tug alongside of your barge? *A.* Never have.

×-*Q.* 124. Have you ever come up any harbor that way? *A.* Yes, sir.

×-*Q.* 125. You could have come up with the tug alongside if you had wanted to that day, couldn't you? *A.* Yes, sir.

×-*Q.* 126. There was nothing to prevent? *A.* Not at all.

×-*Q.* 127. You would have taken up about the same width of the channel as if you were steering after? *A.* About the same.

×-*Q.* 128. You say you have been on sailing vessels? *A.* Yes, sir.

×-*Q.* 129. Steamers? *A.* Yes, sir.

×-*Q.* 130. You don't think it is good seamanship to go across the bow of a vessel? *A.* Not when you come too close.

×-*Q.* 131. If a person has to select one of two courses, you think it is better to cross the stern instead of crossing the bow? *A.* Yes; but there was certainly ample time to go to port.

×-*Q.* 132. Did you make your vessel go to port after the signal? *A.* No.

×-*Q.* 133. Did the tug go to port after the signal? *A.* I don't know that she did.

×-*Q.* 134. What kind of a whistle was it? *A.* A long whistle.

×-*Q.* 135. You know what the signals are, don't you? *A.* I guess so, sir.

×-*Q.* 136. And the signal to go to port is how many blasts? *A.* One blast, sir.

×-*Q.* 137. Is not it a fact that the signal to port the helm is one short blast? *A.* No, sir; it is one long blast.

×-*Q.* 138. You don't understand, then, that the signal is one short blast? *A.* I do not; no, sir.

×-*Q.* 139. There was not any answer given to that signal? *A.* I didn't hear any.

×-*Q*. 140. Don't you understand that one blast of a steam whistle, one short blast of a steam whistle, means "I am directing my course to starboard", and two short blasts means "I am directing my course to port"? *A*. No, sir; I do not read it so.

×-*Q*. 141. You have seen the rules of the road, haven't you? *A*. Yes sir.

×-*Q*. 142. Given you in the custom house? *A*. Yes, sir.

×-*Q*. 143. Don't you understand that when a vessel gives a signal to another that she must direct her course in the way she designates herself? That when one blast of the whistle is given, you are to direct your course to starboard, you must do what you say you do? *A*. I suppose that is the law.

×-*Q*. 144. Don't you know that is the law? *A*. I suppose so.

×-*Q*. 145. The Berkshire was on your starboard hand all the time, was not she? *A*. Yes, sir.

×-*Q*. 146. And therefore you knew that it was your duty to keep out of her way, didn't you? *A*. No, I did not.

×-*Q*. 147. Don't you know that when two vessels are meeting, the one that has the other on the starboard hand has to keep out of the way? *A*. No sir; I do not think so.

×-*Q*. 148. You don't so understand it? *A*. No, sir.

×-*Q*. 149. You say that at the time the collision took place the tug and the barge were swinging round the point? *A*. They were swinging round; yes, sir.

×-*Q*. 150. They were making the arc of a circle, and had got about north in the circle, and they would have to go up to make the circle? *A*. They had to keep inside the buoys.

×-*Q*. 151. I understand these buoys mark the channel for vessels of fourteen or fifteen feet? *A*. I think they do. They are set in about twenty feet of water.

×-*Q*. 152. If a vessel was right close up to the buoys on the left-hand side of the channel, it would not be safe for her to go any further? *A*. I do not think it would.

×-*Q*. 153. You think the mistake the Berkshire made was in reversing her engines? *A*. I think the first mistake she made was not stopping long before.

×-*Q*. 154. If the tug had stopped and backed? *A*. That would not have stopped us.

×-*Q*. 155. Because of the tow line which connected the two vessels? *A*. We had headway, of course; some.

×-*Q*. 156. If the tug had stopped, you would have gone ahead as far as she did? *A*. Yes.

×-*Q*. 157. How many feet do you think you would have gone? *A*. It is hard to tell.

×-*Q*. 158. A vessel that is going up against the tide can change the direction better than one that is going down with the tide? *A*. Yes; she can sheer quicker.

×-*Q*. 159. The tide was running down stream that day? *A*. It was ebb tide.

×-*Q*. 160. How many knots an hour? *A*. I don't know the strength of the tide.

×-*Q*. 161. Was it pretty strong? *A*. No; ordinary stream tide.

×-*Q*. 162. What do you think the direction of the tide that day was? *A*. I didn't know at the time, but I knew afterwards from the way she lay.

×-*Q*. 163. How was that? *A*. About north and south.

×-*Q*. 164. Did you take the compass bearings of the barge on the bottom? *A*. Yes, sir.

×-*Q*. 165. And that was what? *A*. North by east.

×-*Q*. 166. And the blow was a blow at about two points angle? *A*. About that; well, almost three.

×-*Q*. 167. Do you know how far it was from the barge to the buoy on the east side of the channel? *A*. I do not.

×-*Q*. 168. Never took any measurements? *A*. I did not.

×-*Q*. 169. You say that your tow line was one hundred and seventy-five fathoms originally? *A*. Yes, sir.

×-*Q*. 170. And you took in about sixty fathoms? *A*. No, sir; I didn't say sixty.

×-*Q*. 171. What did you say? *A*. About three hundred and ten feet.

×-*Q*. 172. That would be about fifty-two fathoms, to be exact. When you took that in, you took the hawser all in but one hundred and twenty-three fathoms? *A*. Yes, sir; I suppose so.

×-*Q*. 173. You noticed when the collision took place that the towboat was astern of the Berkshire? A. No, sir; I did not.

×-*Q*. 174. You didn't notice anything of that? *A*. I went as far forward as it was safe.

×-*Q*. 175. So that your estimate of the distance between the tug and the barge was the estimate you made before the collision? *A*. Yes, sir.

×-*Q*. 176. And you think, then, they took in about seventy-five fathoms of that hawser after your engine broke down? *A*. That is my opinion; to get about fifty fathom length.

×-*Q*. 177. How did they take it in? *A*. With the steam capstan they have on board.

×-*Q*. 178. So this was taken in about two hours before the collision? *A*. About half past one; that is an hour and a half before.

×-*Q*. 179. That is when you commenced to take it in? *A*. Yes, sir.

×-*Q*. 180. How long did it take to take in the number of fathoms you took in? *A*. We can haul in that whole hawser in twenty to twenty-five minutes.

×-*Q*. 181. After you took your hawser in aboard of your vessel, you say that somebody came from the tug to you? *A*. Yes, sir.

×-*Q*. 182. How did they come? *A*. In the small boat.

×-*Q*. 183. Did he repair the engine? *A*. No, sir; he said it was no use to try to repair it.

×-*Q*. 184. Then he went aboard the tugboat? *A*. No, sir; he stayed on our boat.

×-*Q*. 185. He remained on your boat until after the collision? *A*. Yes, sir.

×-*Q*. 186. Were you making this arc of a circle when the engine broke down? *A*. Oh, no; we were away down the river.

×-*Q*. 187. The vessel didn't stop in order to take the hawser in? *A*. No; the tug had slowed down.

×-*Q*. 188. She would slacken and you would take it in? *A*. We could not haul it in when it was taut.

×-*Q*. 189. You think that at the time of the collision your vessel was going about the same rate of speed? *A.* Was going the same rate as the Berkshire.

×-*Q.* 190. How fast do you think she was going when she commenced to back, to reverse her engines? *A.* She was going at six knots an hour.

×-*Q.* 191. And you were going how fast? *A.* Two or two and a half.

×-*Q.* 192. You kept up the same speed, and the Berkshire slowed down? *A.* She slowed down when the distance was too short; I don't think she was over one hundred feet from us when they commenced, when I see her back water.

×-*Q.* 193. Well, you consider six knots an hour for a vessel comming down Providence River a moderate speed? *A.* Yes, it is not overly fast speed.

×-*Q.* 194. A steamer has to go at about that rate of speed where she is near the bottom in order to mind her helm? *A.* You want some headway on a vessel to steer.

×-*Q.* 195. This was a better place to stop a long vessel like that? *A.* I could not say. My opinion is that it was a worse place.

×-*Q.* 196. Did you see the Berkshire when she passed the Bay Queen? *A.* I didn't take any notice of the excursion steamers at all.

×-*Q.* 197. You saw there was some there? *A.* Yes, sir.

×-*Q.* 198. Was there any time the Berkshire was on your port hand after you first saw her? *A.* No, sir; no time at all.

×-*Q.* 199. But you was on her port hand, wasn't you? *A.* No, sir.

×-*Q.* 200. You think, then, that she was on your starboard hand? *A.* She was coming down the channel, a little on the starboard hand.

×-*Q.* 201. You think that you bore on her starboard bow also? *A.* Must have been.

×-*Q.* 202. The only course for her would have been to go under your stern? *A.* No, sir.

×-*Q.* 203. If you were on her starboard side, and she on your starboard, then you ought to have passed starboard side to starboard side? *A.* Yes, sir.

×-*Q.* 204. That is the position they were in at this time, — starboard side to starboard side? *A.* They were very nearly dead ahead.

×-*Q.* 205. But a little on the starboard? *A.* Yes, sir.

×-*Q.* 206. You were not paying so much attention to the navigation of your vessel, because you had a tug? *A.* We always pay attention to it; we try to steer after the tug.

×-*Q.* 207. You left the direction of the way, which side of the channel you go on, to the tug? *A.* Exactly so.

×-*Q.* 208. And left all signals to him? *A.* Yes, sir.

×-*Q.* 209. And you didn't pay any attention to hear whether she was making signals? *A.* Yes, sir; I invariably look to see what she is blowing to.

×-*Q.* 210. Did you hear the signals when the Berkshire passed the Bay Queen? *A.* No, sir.

×-*Q.* 211. Could you see the puff of the steamer's whistle a mile distant that day? *A.* If you were looking at the steamer, yes, sir.

×-*Q.* 212. After that whistle was given by the tug, the tug went along in the same direction that she had been going? *A.* Yes, sir; she was going up the river.

×-*Q.* 213. But she kept the arc of a circle, just as she was going, didn't she? *A.* Yes, sir.

×-*Q.* 214. In other words, your direction was not changed by reason of any whistles that were given? *A.* We continued the arc of a circle she was making round the point.

×-*Q.* 215. You would have done that if there had not been any steamer round? *A.* To get round the point we would have to; yes, sir.

×-*Q.* 216. And you hadn't finished that arc when the collision took place? *A.* No, sir.

×-*Q.* 217. There was plenty of water for you on the west side of the channel? *A.* We were going up on the east side.

×-*Q.* 218. But there was plenty of room there. She could have done it just as easy to complete the arc, couldn't she? *A.* No, sir; it would have been entirely out of her course to go over to the westward.

×-*Q.* 219. But I mean, she could have done it? *A.* Yes, sir.

×-*Q.* 220. But it was not done? *A.* No, sir.

×-*Q.* 221. The regular course up the channel after the curve is made would be about north half west? *A.* I don't think so.

×-*Q.* 222. Or north half east, that is, to the eastward of north? *A.* Yes.

×-*Q.* 223. And before you got straightened out in her course you would be heading a little to the eastward of north, and the vessel coming down would head to the westward of south. What would you make the course, about south half west, and north by east? *A.* I cannot say; never examined it.

×-*Q.* 224. You are not a pilot on this river? *A.* No, sir.

×-*Q.* 225. You are not a pilot on this course? *A.* I don't carry a pilot's license; no, sir.

×-*Q.* 226. You don't know this channel. You only know by the buoys? *A.* About three hundred feet is the width by the buoys.

×-*Q.* 227. How long is that tugboat? *A.* One hundred thirty-five feet long.

×-*Q.* 228. And your barge is a little over two hundred feet? *A.* Yes sir, on deck.

×-*Q.* 229. And you think that the tow line was about three hundred feet between you? *A.* Yes sir.

×-*Q.* 230. And you think that the direction you were heading was about three points from that which the Berkshire was heading at the time of the collision? *A.* Yes; at the time she struck us, but it was not the course she was going a hundred feet ahead of us.

×-*Q.* 231. How much do you think she changed her course after the reversal of her engines? *A.* I should think her head swung off about a point and a half.

×-*Q.* 232. It takes usually about thirty seconds to make the first half point? *A.* I don't know how fast she steers.

×-*Q.* 233. How fast does your vessel steer? *A.* She would swing a great deal slower than the Berkshire would.

×-*Q.* 234. I asked *how* fast? *A.* I don't know; I never timed her.

×-*Q.* 235. Take as much as a minute? *A.* No, sir; I don't think it would take as much as that.

×-*Q*. 236. You never timed a steamer? *A*. No. I know a steamer or tug will change her course quicker than a sailing vessel will, on account of the water acting on the rudder. But a tug changes her course quicker than any other kind of vessel.

×-*Q*. 237. How is this tug that you had? *A*. She is a quick-handled tug. She has a balanced rudder.

×-*Q*. 238. You think she would change her course quicker than the Berkshire? *A*. Yes, sir.

×-*Q*. 239. You think that when the steamer passed the tug she was about seventy-five feet from the tug? *A*. In a sideways direction; yes sir.

×-*Q*. 240. As they were passing they were drawing apart all the time, were not they? *A*. Yes, sir.

×-*Q*. 241. So that at the time the stern of the Berkshire was abreast of the stern of the tug, there must have been a good deal greater distance between them? *A*. I could not say; I didn't see them.

×-*Q*. 242. But you know that from your knowledge of seamanship? *A*. Yes, that is naturally to be supposed.

×-*Q*. 243. What course was your barge heading at the time you heard this whistle? *A*. About north by west or north half west.

×-*Q*. 244. The only whistle that you heard was the whistle of the tug? *A*. That was the only one.

×-*Q*. 245. And she was heading what course? *A*. About northwest or north half west.

×-*Q*. 246. And you think you changed to the northerly from half a point to a point about the time of the collision. Is that correct? *A*. Yes, sir.

×-*Q*. 247. How was your helm about that time? *A*. Near about amidships.

×-*Q*. 248. How long from the time you heard that whistle to the time the collision took place? *A*. It might have been five minutes, perhaps.

×-*Q*. 249. At that time the Berkshire was on your starboard bow? *A*. Well, we could see her off our starboard bow at the time the whistle blew.

×-*Q*. 250. She would be on the tug's starboard bow, too, wouldn't she? *A*. She would; yes, sir.

×-*Q*. 251. And the circle you made in changing this course was quite a long sweep? *A*. It was not a sharp curve; no, sir.

Direct Examination resumed by Mr. ROELKER.

Q. 252. You say that you heard this blast of the tug. You know the whistle of that tug when you hear it? *A*. Yes, sir; I could tell it among any other whistles along the coast, with the exception of three.

Q. 253. Is the Berkshire one of these three? *A*. No, sir.

Q. 254. The tug gave a signal to pass on the port side? [*Objected to by* Mr. CARVER.] *A*. Yes, sir.

Q. 255. Was it the kind of blast that is given by vessels of that kind? *A*. Yes, sir.

Q. 256. You say that she bore very much more to starboard when you were below the light? *A*. Yes, sir.

Q. 257. And when the tug gave this whistle she was below the light, wasn't she? *A*. Yes, sir.

Q. 258. And past the red buoy, beyond the light, the channel leads very much to the eastward? *A*. Yes, sir.

Q. 259. And she was coming down; she was heading to the southward, and you were heading about northwest or north half west? *A*. Yes, sir.

Q. 260. And you came together head on? *A*. Yes, sir.

Q. 261. You were on the eastward side of the channel all the time? *A*. Yes, sir.

Q. 262. And she was on the west side of the channel? *A*. Yes, sir; she appeared to be that way.

Q. 263. Mr. Carver has suggested that even if the tug had stopped that would not have stopped you, because you were on a tow line and you would keep up your headway for a while. *A*. Yes, sir.

Q. 264. If you had been lashed alongside the tug, would you have stopped immediately when she did? *A*. It would not stop her headway immediately.

Q. 265. The length of your vessel was about double the length of the tug? *A.* The one is one hundred and thirty-five feet and the other two hundred and ten on deck.

Cross Examination resumed by Mr. Carver.

×-*Q.* 266. The reason that the Berkshire bore more ahead after the whistle was because you swung more to the northward? *A.* To the northward and eastward as we came round the point.

×-*Q.* 267. Did your vessel swing more to the northward, and that is why she bore directly ahead? *A.* Yes, sir.

×-*Q.* 268. Now, about backing; if the tug was alongside of your vessel, and she stopped, you would stop at the same time the tug would? *A.* Yes, sir, if the lines did not part.

×-*Q.* 269. And the question as to how you would turn and swing would be owing to which side the tug was on, wouldn't it? *A.* Exactly so.

×-*Q.* 270. And when you said you would not stop for considerable time after the tug stopped, you meant for a considerable time after she stopped her engines? *A.* Yes; I said until she backed.

×-*Q.* 271. The tug and your vessel would stop in about the same length of time? *A.* She would probably stop a little ahead of us, if she was ahead of us in the water.

×-*Q.* 272. That is owing to the momentum. If the two were together they would act as one vessel. It was perfectly feasible that your vessel should have been lashed alongside of the tug going up the river at that time? *A.* Yes, sir.

×-*Q.* 273. You say that the tug backed before the collision? *A.* I didn't say so; no, sir.

×-*Q.* 274. You said she stopped. Did she give any whistles when she stopped? *A.* No, sir.

×-*Q.* 275. Did you put your helm hard a-starboard before the Berkshire got up to the tug? *A.* About that time; when I seen that the tug kept off from under the bow of the Berkshire, I sung out, "Hard a-starboard."

×-*Q.* 276. You could have done it a little while before? *A.* I suppose so.

×-*Q.* 277. And if you had done it a little while before, there would not have been any collision? *A.* Yes, there would have been a collision just the same, because he reversed his engines and swung his head round and came into us.

×-*Q*. 278. If you had put your helm hard a-starboard before the Berkshire came up to the tug, there would not have been any collision? *A*. I could not say with regard to that.

DEPOSITION OF H. L. SIMPSON.

Direct Examination by Mr. ROELKER.

PROVIDENCE, March 22, 1894.

Q. 1. What is your occupation? *A*. Chief engineer of the Tug N. & W. 1.

Q. 2. Were you chief engineer of the tug at the time of the collision with the Berkshire in August last? *A*. Yes, sir.

Q. 3. Do you remember anything being done to the hawser of the tug on that day? *A*. Yes, sir.

Q. 4 If so, what? *A*. Along off of Bristol, somewhere there, they started to shorten the hawser on the barge, and the engine gave out and broke down; and then they took the hawser to our capstan aboard the tug, then shortening it up to our usual length of our tow line —

Mr. CARVER. Did you see this? *A*. I did.

Q. 5 (*by* Mr. ROELKER). About how long was the usual length, to which you shortened it on that day? *A*. I should judge about a length and a half of the barge.

Q. 6. About a length and a half of the barge N. & W. 4? *A*. Yes.

Q. 7. Which you were towing? *A*. Yes.

Q. 8. Do you remember what the length of the barge was, in feet? *A*. I have been told that it measured —

Mr. CARVER. Never mind what you have been told. Do you know? *A*. I don't know.

Q. 9 (*by* Mr ROELKER). You only know what you have been told? *A*. Yes.

Q. 10. You say the usual length. Where were you in the habit of towing with that length of tow line? *A*. In all the harbors that we go into.

Q. 11. What harbors are those? *A.* Norfolk, New York, Hell Gate, New Haven, Providence, Boston and Portland. I believe that is about all.

Q. 12. Could you tow that barge with any shorter length of hawser? *A.* Yes, sir.

Q. 13. Successfully? *A.* No, sir; not successfully.

Q. 14. Why not? *A.* With a short hawser the quick-water from the propeller will make the barge sheer so you couldn't keep her in the channel.

Q. 15. What is the depth of the wheel of your tug below the water, if you know? *A.* About four feet at that time.

Q. 16. The depth of the wheel? *A.* From the top of the wheel to the surface of the water.

Q. 17. From the top of the wheel to the surface of the water? *A.* Yes.

Q. 18. And from the bottom of the wheel to the top of the wheel? *A.* Nine feet three inches in diameter.

Q. 19. Nine feet three? *A.* Yes, sir. The pitch of the screw is twelve and one half feet.

Q. 20. Now, you say that they shortened it up on board the tug. What did you do, if anything, after that? *A.* I went back to the barge in the small boat to fix up her engine.

Q. 21. After you had shortened up the hawser in this manner, did the tug start up again? *A.* After I got aboard the barge, she started up towards Providence.

Q. 22. At what rate of speed? *A.* I couldn't say, but I should judge about — I don't know what speed she was; I don't know what time she rung up, or whether she did or not.

Q. 23. You didn't notice about that? *A.* No.

Q. 24. When did you go back on the deck of the barge? *A.* After fixing the engine?

Q. 25. On board of the barge. *A.* As soon as I got done shortening the hawser on the tugboat. That was down towards Bristol somewhere.

Q. 26. After you got through fixing the engine you came back on the deck, didn't you? *A.* Yes, sir.

Q. 27. Whereabouts were you then? *A.* Some distance below this Sabin's Point lighthouse.

Q. 28. Where the accident occurred? *A.* Yes, sir. I don't know just exactly how far.

Q. 29. Whereabouts did you go on the barge then? *A.* About amidships.

Q. 30. Did you hear the tug give any signal that day? *A.* Yes, sir.

Q. 31. Whereabouts was the tug when she gave the signal? *A.* Well, she was somewhere very close to the lighthouse. She must have been right about abreast the lighthouse.

Q. 32. Nearly abreast the lighthouse, you think? *A.* Yes, sir.

Q. 33. What signal did she give? *A.* One blast.

Q. 34. Of what? *A.* Of the whistle.

Q. 35. And she signalled to starboard? *A.* Yes, sir.

Q. 36. Did you see any vessel to which she was apparently giving this signal at that time? *A.* No, sir.

Q. 37. You didn't look out for any? *A.* I saw the Berkshire.

Q. 38. You saw the Berkshire? *A.* Yes, sir.

Q. 39. Where was she? *A.* She was about half a mile ahead of the tugboat.

Q. 40. Coming down the stream? *A.* Coming down the stream.

Q. 41. Did she make any answer to this whistle? *A.* No, sir.

Q. 42. Where was the barge, with reference to this lighthouse, when the collision occurred? *A.* She was a little bit to the northward, and a little bit to the eastward of where she lay when she was sunk on the bottom.

Q. 43. How much to the northward, should you say? *A.* I should say the length of the barge.

Q. 44. And how much to the eastward? *A.* About the width of the barge, I should say.

Q. 45. How was the barge steering before the collision, with reference to the tug? *A.* Behind her.

Q. 46. Right along behind her? *A.* Yes, sir.

Q. 47. And how close to the lighthouse was the tug when she passed it? *A.* That I don't know; I didn't notice.

Q. 48. Which way was the tug heading? *A.* By the compass?

Q. 49. Yes, if you know that. *A.* I don't know the compass. I don't know the course of the river.

Q. 50. About how fast was the tug going after she gave the whistle and before the collision? *A.* About two and a half knots, I should judge.

Q. 51. About two and a half knots through the water? *A.* Through the water.

Q. 52. Did you notice the tug change her course at all before the collision? *A.* No, sir.

Q. 53. You didn't notice that? *A.* No, sir.

Q. 54. Did you hear any order given on the barge about changing the wheel? *A.* After the Berkshire had passed the tug, and before she struck her, I did.

Q. 55. What order was that? *A.* The captain gave the order to the man at the wheel to put his wheel hard a-starboard, and sent another man in there to help him do it.

Q. 56. How close did the Berkshire pass the tug, if you noticed that? *A* That I didn't notice either, but I know it wasn't very far.

Q. 57. Did you notice whether the Berkshire had reversed her engine at any time? *A.* I couldn't tell from where I was whether she had reversed her engine or not. I knew she had done it because her bow paid off.

Q. 58. When did you see her bow pay off? *A.* After she had passed the tugboat, it was probably a length of the barge from the barge when she commenced to. It was after she got by the tugboat.

Q. 59. You think her bow commenced to pay off after she had passed the tugboat and after she was about a length from the barge? *A.* I should think so.

Q. 60. Which way did her head pay off? *A.* Towards the centre of the channel.

Q. 61. Which way? *A.* Towards the westward.

Q. 62. To her starboard? *A.* Yes, sir; and towards our starboard side.

Q. 63. Towards your starboard bow? *A.* Yes, sir.

Q. 64. If she had held her course and not paid off her bow in that way, would she or not, in your opinion, have struck the barge?

A. She might possibly have touched her, but she wouldn't have hurt her. She might have touched her at her stern as she passed by her, but she wouldn't have hurt her. There was plenty of room to go by.

Q. 65. About how fast did the Berkshire appear to be coming down towards you when she passed the tug? *A*. Well, I should think she was going at least nine knots an hour.

Q. 66. And when she struck you, how fast was she going, in your opinion? *A*. Well, she had reduced her speed considerably, but I don't know how fast she was going.

Q. 67. How fast do you think? *A*. She must have been going at least five or six knots an hour then.

Q. 68. Where did she strike the barge? *A*. On the starboard bow.

Q. 69. And what did she do after she had struck the barge? *A*. She backed off to the eastward first and pulled out of her, and went down on the east side of the barge.

Q. 70. Went down on the east side of the barge between the barge and the lighthouse? *A*. Between the barge and the lighthouse.

Q. 71. When she backed out, which way did she point, up the channel or across the channel, or how? *A*. She was diagonally down the channel, with her head pointing down the channel somewhere.

Q. 72. Diagonally across? *A*. Yes, sir.

Q. 73. And after she had gone down between you and the lighthouse, what did she do? *A*. She went off to the westward first and stopped for some little time, and then turned around and came back up to Providence; came up on the west side of us.

Q. 74. Are you familiar with the channel down there? *A*. No, sir.

Q. 72. How long was it after the collision before the barge sank? *A*. I should say about eight minutes.

Q. 76. How did she go down? *A*. Bow first.

Q. 77. What kind of weather was it? *A*. Fine weather.

Q. 78. How was the wind? *A*. There was no wind to speak of. I don't know what direction it was from. There was none to speak of.

Q. 79. What was the tide? *A.* That was ebb.

Cross Examination by Mr. CARVER.

×-*Q.* 80. As I understand, the diameter of your screw is nine feet six? *A.* Nine feet three inches.

×-*Q.* 81. And what is the pitch? *A.* Twelve feet and a half.

×-*Q.* 82. And it is four feet below the water line? *A.* It was about four feet below the water line on that day.

×-*Q.* 83. Have you been in ocean steamers at any time? *A.* Yes, sir.

×-*Q.* 84. What kind of steamers? *A.* I have been in ocean towboats.

×-*Q.* 85. Have you ever been engineer on steamers which were not towboats? *A.* Yes, I have.

×-*Q.* 86. What kind? *A.* I was engineer of the steamship Enchantress for awhile.

×-*Q.* 87. And boats of the size of the Berkshire or larger? *A.* I don't know. I guess she is fully as large as the Berkshire.

×-*Q.* 88. And she had a right-handed propeller? *A.* Yes, sir. I was engineer on the steamship Scythia for quite awhile.

×-*Q.* 89. You say that the barge commenced to shorten the hawser, and then something broke down? *A.* Yes, sir.

×-*Q.* 90. And then you went to the barge from the tugboat? *A.* No, sir; I went to the barge after they had completed shortening the hawser aboard the tugboat.

×-*Q.* 91. Then you understood that the barge's engines broke down, and you didn't go to the barge at all until the hawser was shortened? *A.* Until the hawser was shortened aboard the tugboat.

×-*Q.* 92. Did you send any one to the barge? *A.* No, sir; I went myself.

×-*Q.* 93. You went to examine the engines? *A.* Yes, sir.

×-*Q.* 94. And isn't it a fact that the shortening of the hawser on the towboat was done while you was on the barge? *A.* No, sir. The shortening of the hawser on the tugboat was done while I was on board the tugboat, before I went aboard the barge.

×-*Q*. 95. Did you attend to it, or did your first assistant? *A*. To what?

×-*Q*. 96. To the shortening of the hawser. *A*. No, sir; neither one.

×-*Q*. 97. Who did? *A*. The captain.

×-*Q*. 98. Were you on deck? *A*. Yes, sir.

×-*Q*. 99. How much of the hawser do you think was pulled in aboard of the tug? *A*. I don't know.

×-*Q*. 100. You didn't make any estimate of that? *A*. No.

×-*Q*. 101. And then you went aboard of the barge; and while you were aboard of the barge there wasn't any of the hawser shortened on board of the barge, was there? *A*. No, sir.

×-*Q*. 102. Nor on board of the tug? *A*. No, sir.

×-*Q*. 103. When you first saw the Berkshire, you say she was off the starboard bow of the barge, don't you? *A*. Yes, sir.

×-*Q*. 104. And she was at that time on the starboard bow of the tug? *A*. Yes; I must have seen her off that side, about ahead of her.

×-*Q*. 105. During this time, *i. e.*, just prior to the collision, the tug and the barge were going in the arc of a circle, were they not, around the point? *A*. I don't know. The barge was pretty near astern of the tug, if not quite. I wasn't paying particular attention to that, — not to the course the tug was steering.

×-*Q*. 106. Then you were not paying particular attention as to whether or not the barge was directly behind the tug, were you? *A*. When you talk about a bee line, of courseI wasn't; but I know she was, because I looked when the tug blew the whistle.

×-*Q*. 107. At the time the whistle was blown you think the barge was directly behind the tug? *A*. Very near it.

×-*Q*. 108. After the whistle was blown the tug directed her course to the eastward, didn't she? *A*. I didn't take any notice of that.

×-*Q*. 109. You didn't take any notice of that? *A*. No.

×-*Q*. 110. You didn't take any notice of the course of either the barge or the tug after the whistle was blown? *A*. No; I know the barge was following about behind the tug.

×-*Q*. 111. About behind the tug? *A*. Yes, sir.

×-*Q*. 112. What part of the barge were you on when the whistle was blown? *A*. About amidships.

×-*Q*. 113. On deck? *A*. Yes, sir.

×-*Q*. 114. Which side? *A*. On the starboard side.

×-*Q*. 115. Then the first you noticed about the Berkshire particularly was that her head was paying off, you said, to starboard? *A*. No; I didn't say that.

×-*Q*. 116. You say that when one whistle was blown you saw the Berkshire? *A*. Yes.

×-*Q*. 117. And when the Berkshire got about abreast the tug, you noticed that her head was paying off to starboard? *A*. She was past the tug.

×-*Q*. 118. Before she reached the barge her head was paying off to starboard? *A*. Yes, sir.

×-*Q*. 119. And you knew from that that the engines of the Berkshire were working full speed astern, didn't you? *A*. I didn't say so. I judged from that that the engines of the Berkshire were backing; I don't know at what speed.

×-*Q*. 120. You judged that they were backing? *A*. Yes, sir.

×-*Q*. 121. And the backing of her engines and of her propeller of course would have a tendency to throw her head to starboard? *A*. Yes, sir.

×-*Q*. 122. And you don't think that if the Berkshire had kept on her course there would have been any collision? *A*. No, sir

×-*Q*. 123. You think they would have gone clear? *A*. I think they would have gone clear; might have touched.

×-*Q*. 124. You think the collision was caused by the Berkshire reversing her engines? *A*. No, sir; I think it was caused by bad judgment on the part of the captain of the Berkshire.

×-*Q*. 125. You say that you saw her head paying off to starboard? *A*. Yes, sir.

×-*Q*. 126. And you think that if she hadn't reversed her engines and kept on there wouldn't have been any collision? *A*. Exactly.

×-*Q*. 127. That they would have gone clear? *A*. Yes, sir.

×-*Q*. 128. Then you think that the reversing of the engines caused the collision, don't you? *A*. No, sir; I can't say that.

×-*Q*. 129. That caused the paying off to starboard? *A*. It did cause the paying off to starboard; yes, sir.

×-*Q*. 130. And paying off to starboard was what caused the collision? *A*. No, sir; it didn't cause the collision. The boat was in the wrong place that caused the collision.

×-*Q*. 131. You say that if the Berkshire had gone ahead you don't think that there would have been any collision? *A*. I think if the Berkshire had held her course and came ahead that there would have been no collision.

×-*Q*. 132. Then, in your opinion, reversing the engines of the Berkshire at that time was bad judgment? *A*. Yes, sir; very bad judgment.

×-*Q*. 133. You think she ought to have gone ahead? *A*. I think she ought to have come ahead at that time.

×-*Q*. 134. How long do you think it was from the time that you first saw the Berkshire's head paying off to starboard until the collision took place? *A*. That was a very short time. I don't know how long. It couldn't have been over a minute, I shouldn't think.

×-*Q*. 135. You think about a minute? *A*. About a minute; somewhere about there.

×-*Q*. 136. You say that you know the action of the engines of these steamers. Have had experience, of course? *A*. I am an experienced engineer; yes, sir.

×-*Q*. 137. And how long after the engines get going full speed astern, in a vessel of the size of the Berkshire, would it be before there would be a change in the direction in which the vessel was pointing? *A*. The engineer's place is in the engine room, and he can't tell what is going on on deck. He don't know when the boat stops running. I don't know.

×-*Q*. 138. I didn't ask you that. If a vessel, for instance, was going ahead at say seven or eight knots, the full speed, we will say, being thirteen knots, and the engines are reversed full speed astern, how long after the order to reverse full speed astern was given would it be before the head of the vessel would, in the case of a right-handed propeller, pay off to the starboard? *A*. I don't know.

×-*Q*. 139. Do you think it would be half a minute? *A*. About that. I know that the engines will go astern immediately, but how the hull goes is out of my line of business.

×-*Q*. 140. You have been on deck when vessels have been put full speed astern? *A*. A great many of them.

×-*Q*. 141. And you have noticed that some time elapses after the vessels have been put full speed astern before the head goes off to starboard? *A*. Yes, sir.

×-*Q*. 142. How long a period was it in the instances you knew about? *A*. I didn't pay much attention.

×-*Q*. 143. Half a minute? *A*. I didn't notice.

×-*Q*. 144. It was some seconds? *A*. Some seconds. I know about how far our boat will go before she commences to check her way. I mean by our boat the one I am on now.

×-*Q*. 145. I don't ask about checking the way, but I ask about the swinging. *A*. That I don't know, because it is something that I don't pay any attention to. It isn't my business.

×-*Q*. 146. But from your knowledge and experience on steamboats, you think that the engines of the Berkshire must have reversed some time before you saw that her head was paying off to starboard, don't you? *A*. No; I don't say that.

×-*Q*. 147. I ask you that. *A*. Repeat the question.

×-*Q*. 148. But from your knowledge and experience on steamboats, you think that the engines of the Berkshire must have reversed some time before you saw that her head was paying off to starboard, don't you? *A*. I don't know how long a time. It must have been some time, certainly; a second or ten or twenty.

×-*Q*. 149. Whether it would be a half a minute, you don't know? *A*. No.

×-*Q*. 150. But you say that from the time you saw this paying off until the time of the collision was somewhere about a minute? *A*. It was somewhere about a minute, judging from the distance that the Berkshire came.

×-*Q*. 151. And you noticed that the speed of the Berkshire was considerably reduced from what she was going at the time of the collision? *A*. I should judge it was considerably reduced.

×-*Q*. 152. You think it reduced considerably, don't you? *A*. Yes, sir.

×-*Q.* 153. Do you think it reduced over half? *A.* No.

×-*Q.* 154. You have had experience with your tug with regard to reversing? *A.* Yes, sir.

×-*Q.* 155. How long does it take from the time you reverse your engines, in case you are going full speed astern, until you would bring the boat dead in the water? *A.* I never timed this boat going by any point, but I should say five or six lengths.

×-*Q.* 156. How long is the boat? *A.* The boat is one hundred and thirty-five feet long.

×-*Q.* 157. Then you think somewhere about six hundred feet? *A.* I should say about five or six lengths. That would be five or six hundred.

×-*Q.* 158. Or six or seven hundred feet. You wouldn't say within a hundred feet? *A.* No, sir; I wouldn't say within a hundred or two hundred feet, because I never timed it.

×-*Q.* 159. Did you notice whether or not the barge changed her heading under the hard a-starboard helm? *A.* I don't think she had time.

×-*Q.* 160. So you think that at the time the collision took place the barge was heading in the same direction that she was before the Berkshire came up to the tug? *A.* She was heading in about the same direction.

×-*Q.* 161. You don't think that any change of the helm had any effect on her whatever? *A.* I don't think it had quite time. It had to have some effect; hadn't had time to have much.

×-*Q.* 162. This blow was a glancing blow, wasn't it? *A.* No, sir.

×-*Q.* 163. The angle of the collision was about how many points, taking the keel of the two vessels as a line? *A.* I couldn't say, but I should think about an angle of forty-five degrees. It struck here and went clear through here.

×-*Q.* 164. An angle of about four points? *A.* I don't know anything about points. I should say an angle of forty-five degrees.

×-*Q.* 165. At the time of the collision was the barge heading right behind the tugboat? *A.* Pretty near. It was somewhere about there. I didn't notice particularly how she was. I know she was heading very nearly behind the tug, if not quite.

×-*Q*. 166. What do you mean by very nearly? *A*. She wasn't out of the way but a very little. The tug was ahead of her.

×-*Q*. 167. How many degrees difference do you think there was between the course of the tug and the course of the barge? *A*. I didn't notice that there was any at all.

×-*Q*. 168. You didn't notice much about it? *A*. Yes; I know the tug was ahead of her, but I didn't look at the compass to see how many degrees they were.

×-*Q*. 169. Did you notice whether they were heading in the same direction? *A*. That would make them head in the same direction, the tug being ahead of the barge.

×-*Q*. 170. Putting the helm hard to starboard had a tendency on the barge to prevent the collision, didn't it? *A*. It had a tendency to throw the barge's bow to port.

×-*Q*. 171. And that had a tendency to prevent the collision. *A*. If there had been time enough; if the barge had been on the other side of the river, and there was time enough.

×-*Q*. 172. Now, you saw the swinging off of the Berkshire yourself. Did you report it to anybody aboard of the barge? *A*. No, sir.

×-*Q*. 173. And after you saw this Berkshire swing to starboard, you heard the order of the captain of the barge to put the helm hard to starboard? *A*. Yes, sir.

×-*Q*. 174. How long do you think the order to put the helm hard to starboard was before the collision? *A*. Well, it was a very short time; I don't know how long.

×-*Q*. 175. Only a few seconds? *A*. It was less than a minute, I think; about a minute.

×-*Q*. 176. And you say at the time that you saw that the bow of the Berkshire was paying off to starboard, that she had passed the tug? *A*. She had passed the tug; yes, sir.

×-*Q*. 177. Now, if the barge had put her helm hard a-starboard at the time that the bow of the Berkshire was abreast of the bow of the tug, she would have obeyed her starboard helm considerably, wouldn't she? *A*. I don't know. I don't know how fast those barges obey their helm.

×-*Q*. 178. You think so, don't you? *A*. I don't know.

×-*Q*. 179. Who was on the deck of the barge besides yourself? *A*. Captain Burnett — I think they were all there except the man at the wheel.

×-*Q*. 180. Where was the man at the wheel? Was he at the stern of the vessel? *A*. No, sir.

×-*Q*. 181. About amidships? *A*. It is in the pilot house, abaft of midships.

×-*Q*. 182. Was the captain near the pilot house? *A*. He was very close to the pilot house.

×-*Q*. 183. Anybody at the bow of the barge? *A*. I don't know whether there was or not.

×-*Q*. 184. Did you hear any report made by any one to the captain, of the way the Berkshire was coming? *A*. I didn't hear any.

×-*Q*. 185. You didn't consider yourself as one of the crew of the barge? *A*. No, sir.

×-*Q*. 186. You were rather a spectator? *A*. I was standing talking with the captain of the barge.

×-*Q*. 187. You were standing talking with the captain of the barge? *A*. Yes, sir.

×-*Q*. 188. What were you talking about? *A*. Talking about the way the Berkshire was coming.

×-*Q*. 189. Talking about the way the Berkshire was coming? *A*. Yes, sir.

×-*Q*. 190. Did you call his attention to the fact that the Berkshire — *A*. He called my attention to it.

×-*Q*. 191. After he called your attention to it, what did he do? Did he go aft? *A*. No, sir. I think we didn't move at all at that time; not just then.

×-*Q*. 192. Not just then? *A*. No.

×-*Q*. 193. Kept on talking about it? *A*. No, sir.

×-*Q*. 194. What else did you see him do? *A*. I didn't see him do anything.

×-*Q*. 195. Did you tell him you thought the Berkshire was reversing her engines? *A*. No, sir.

×-*Q*. 196. Did he say anything about the Berkshire reversing her engines? *A*. He said, after she started to reverse, that she was going to run into us. After the Berkshire's bow commenced to pay off to starboard he said she was going to run into us, and gave the order to the man at the wheel to hard a-starboard, and sent a man in the pilot house to help him.

×-*Q*. 197. Did he say anything about reversing the engines? *A*. No, sir; he didn't say anything about reversing the engines.

×-*Q*. 198. As far as you know, he didn't know whether she was reversing her engines or not? *A*. He didn't say it to me.

×-*Q*. 199. But you knew she was reversing her engines? *A*. I didn't know; I supposed she was, for I know it would have that effect on steamboats.

×-*Q*. 200. And you supposed at that time that she was doing it? *A*. Yes, sir.

×-*Q*. 201. You say that the captain of the barge first called your attention to the fact that the Berkshire's head was paying off to starboard, and that upon seeing the Berkshire's head paying off to starboard, you at that time became of the opinion that the Berkshire was reversing; and that it was considerable time after that before the captain of the barge gave the order hard a-starboard. Is that correct? *A*. No, sir; nothing near it.

×-*Q*. 202. Well, state what portion of the question is incorrect. *A*. It is all incorrect; just about all of it incorrect.

×-*Q*. 203. Then state what the facts were. *A*. In what way? What do you want me to state? You haven't asked me that question at all.

×-*Q*. 204. You say that the first that you knew that the Berkshire was paying off to starboard was from the fact that the captain of the barge called it to your attention? *A*. No, sir; I didn't; I said the captain of the barge called my attention to the way the Berkshire was coming.

×-*Q*. 205. Did he call your attention to the fact that her head was paying off to starboard? *A*. No, sir.

×-*Q*. 206. But you saw that it was? *A*. I seen that myself.

×-*Q*. 207. Did you call his attention to it? *A*. No, sir.

×-*Q*. 208. Didn't say anything to him about it, did you? *A*. Not to answer his question. I will tell you the whole story, if you want it.

×-*Q.* 209. Very well; tell the story. *A.* After the Berkshire had passed the tugboat, or just about the time she was passing the tugboat, he said, "We are going to have a close shave of it." I said, "I don't think so." And after the Berkshire's bow had commenced to pay off, he said, "She is going to run into us," and holloed to the man at the wheel to hard a-starboard; and I guess that was all that was said. He said, "She is going to run into us," and holloed to the man at the wheel to hard a-starboard, and sent another man in there to help him execute the order.

×-*Q.* 210. Was the helm put hard a-starboard before the collision took place? *A.* I suppose so; I don't know.

×-*Q.* 211. If the helm of the barge had been put hard a-starboard about the time the Berkshire was abreast the tug, you don't think there would have been a collision? *A.* I didn't say that.

×-*Q.* 212. Do you think there would? *A.* I think if the Berkshire had gone right along there wouldn't have been any collision at all.

Direct Examination resumed by Mr. ROELKER.

Q. 213. I understood you to say, when he asked you some time ago, that you thought the Berkshire was in the wrong place in the river? *A.* Yes, sir.

Q. 214. What did you mean by that? *A.* I mean that if she had answered our whistle, and went where she ought to have gone, she would have been on the other side.

Q. 215. What side? *A.* On the western side of the channel.

Q. 216. If she had obeyed the signal which you gave her and gone on the western side, would there, in your opinion, have been any collision? *A.* Certainly not.

Q. 217. If, after she had disobeyed your signal and came on the eastern side, she had held her course and kept right along, would there have any collision? *A.* I couldn't say about that. There was plenty of room for her to go down on the easterly side of her without hitting her.

Q. 218. Now, you say that the captain stood beside you, and as the Berkshire passed the tug he said, "We are going to have a close shave"? *A.* Yes.

Q. 219. And you said, "I don't think so"? *A.* Exactly.

Q. 220. And then after she had passed the tug her head commenced to pay off towards you? *A*. Yes.

Q. 221. And then he said, "She is going to run into us"? *A*. Yes.

Q. 222. And gave the order? *A*. Yes.

Q. 223. Now, was there any time between the time that her head began to pay off and the time that he gave this order? *A*. None at all.

Q. 224. Just as soon as her head began to pay off he gave the order hard a-starboard? *A*. It might have been even before. He gave it as quick as he could talk it.

Cross Examination resumed by Mr. CARVER.

×-*Q*. 225. Your barge wasn't headed directly up stream, was it? *A*. Yes, sir; she was going up stream.

×-*Q*. 226. She was going around the point, wasn't she? *A*. No; she wasn't going around the point. There was a point there, but I don't think she had started to swing around it yet.

×-*Q*. 227. She wasn't heading in the opposite direction from the Berkshire, was she? *A*. Very near it. She was coming down and we were going up.

×-*Q*. 228. And you are doubtful whether she was swinging around the point or not? *A*. She wasn't up to the point, because I recollect the location of the lighthouse.

×-*Q*. 229. How much difference do you think there was in the force of the Berkshire when you first saw her and the force of the barge? *A*. I don't know. I wasn't paying any attention to that.

×-*Q*. 230. But the Berkshire at all times bore on the starboard side of the barge and of the tugboat, didn't she? *A*. At the time that I saw her I looked at her from our starboard side.

×-*Q*. 231. And you say that you heard one whistle on the part of the tug? *A*. Yes, sir.

×-*Q*. 232. Was there any change of course made on the part of the tug or barge after the time that one whistle was given? *A*. I don't know. I don't think there was much of any change made, although I don't know.

DEPOSITION OF O. S. BAKER.

Direct Examination by Mr. Roelker.

Q. 1. Please state your name, age, residence and occupation? *A*. O. S. Baker; fifty-one; Berkeley, Va.; seaman.

Q. 2. You were captain of the tug N. & W. 1 on the day when the collision occurred in August last? *A*. Yes, sir.

Q. 3. What, if anything, was done about the hawser on that day? *A*. At what time?

Q. 4. Before the accident? *A*. Off of Bristol we started to shorten up the hawser, and the barge took in some, — I don't know how much, one third, maybe, or more, and signalled that her engine had broken down and that she couldn't haul any more. We put the hawser on our capstan and hauled in the hawser until we got our usual length of harbor tow line, and then started ahead.

Q. 5. How much did you have out? *A*. We had out then fifty fathoms.

Q. 6. Was any change made in that length from that time until the collision? *A*. No, sir.

Q. 7. You say your usual harbor length of tow line. How long have you been on these towboats? *A*. I have been captain of steamers towing since about '71.

Q. 8. And how long in this vessel that you now have? *A*. I have been on her ever since she was built. In August it will be four years.

Q. 9. And where have you towed, and how much? *A*. On this boat, do you mean?

Q. 10. Yes, and since '71? *A*. I have towed from the West Indies and Key West and South America — the northern portion, and all along the coast from Norfolk up, excepting Philadelphia.

Q. 11. You have been towing about all the time? *A*. All the time on this boat.

Q. 12. You say this fifty fathoms of tow line is the usual harbor length? *A*. That is our usual harbor length, and that is about the length that other people use for that size tows.

Q. 13. What harbors have you towed in? *A.* We have towed into New York and through the Gate, New Haven, Providence, New Bedford, Boston, Salem and Portland.

Q. 14. Any Southern ports? *A.* None south of Norfolk in this boat.

Q. 15. Now could you have towed her with a shorter line successfully? *A.* We can't tow any shorter with our boat, and have the barge steer nicely and under full command.

Q. 16. When you started up that day, did you do anything about the engineer? *A.* After we had started, the engineer came to me and said he thought if he could get aboard her he could fix her engine so they could haul the hawser aboard her. I stopped the boat, and told the barge to send up his boat and get the engineer and take him aboard, which he done.

Q. 17. How fast did you tow after you had shortened, going up the river? *A.* We were then under three quarters speed, going through the water probably six knots.

Q. 18. Did you notice the Berkshire coming down later on? *A.* After we got up a good piece; yes.

Q. 19. Where were you when you first saw her? *A.* Near the first black buoy below Sabin's Point.

Q. 20. Below Sabin's Point Light? *A.* Yes, sir.

Q. 21. Where was the Berkshire then? *A.* Nearly abreast of Pomham, as near as we could get. It might have been a little above, but nearly abreast of it.

Q. 22. Did you afterwards that day give any signal to the Berkshire? *A.* Blew one whistle.

Q. 23. Where were you when you gave that whistle? *A.* Shall I tell what I did before I gave the whistle?

Q. 24. Yes. *A.* After I sighted the Berkshire we were about in the centre of the channel, and I sighted the Berkshire nearly abreast of that black buoy, and I ported the wheel to take the starboard side of the channel, and slowed up.

Q. 25. Slowed up to what? *A.* About one quarter or one third speed that we were going then; about one quarter full speed.

Q. 26. How fast would that send you through the water? *A.* Over the ground about two knots.

Q. 27. Did you continue at that speed from that time until after the collision? *A.* After we had ported and run some way and got over that side of the channel, we blew one whistle.

Q. 28. What signal is that, under the regulations? *A.* That is a signal to pass to starboard.

Q. 29. That is, pass to port? *A.* Port sides to port sides; yes.

Q. 30. Where were you when you gave this whistle with reference to Sabin's Point Light? *A.* We were then a little more than half way from that black buoy up to Sabin's Point.

Q. 31. Between the black buoy and Sabin's Point, about half way? *A.* Yes.

Q. 32. And on the starboard side of the channel? *A.* A little on the eastward side of the channel.

Q. 33. And how was the barge heading behind you? *A.* She followed us at that time that we were blowing the whistle.

Q. 34. And at that time you saw the Berkshire, and where was she? *A.* She was then a little above the black buoy; that is, between Pomham and Sabin's Point.

Q. 35. And whereabouts in the channel did she seem to be? *A.* She seemed to be a little on the starboard side, as she had just passed some other steamers.

Q. 36. You mean on her starboard side? It would be the west side? *A.* Yes, sir; a little; not much.

Q. 37. A little to the westward of the centre of the channel? *A.* To let these steamers pass her.

Q. 38. She was coming down? *A.* She was coming down.

Q. 39. You saw her over your starboard bow, I suppose, at that time? *A.* Yes, sir.

Q. 40. Which side of the light, east or west? I mean in looking at her you looked to the eastward of the light, didn't you? *A.* When we first saw her we looked to the eastward of the light, but when we blew the whistle we had opened her up to the northward of the light.

Q. 41. Northward and westward? *A.* Northward and westward of the light.

Q. 42. Did she answer your whistle? *A.* No, sir.

Q. 43. At no time? *A.* No time.

Q. 44. What course did you steer? *A*. We kept holding to starboard on to the east side of the channel as close as we dared, and to keep our barge from going aground.

Q. 45. How close to the light did you pass? *A*. I judge about four hundred feet.

Q. 46. Four hundred feet from the lighthouse? *A*. Yes.

Q. 47. When you passed the light what course did you steer by the compass, if you know? *A*. After we had hauled in to keep on we were steering about north by east.

Q. 48. And how did the barge steer? *A*. As near as I could judge at that time, she was heading about north.

Q. 49. That was at the time that you opened her up, and just after you blew the whistle? *A*. I didn't open up. What I mean is,—not opening the boat, but opening the sight of the Berkshire.

Q. 50. I use it in that sense. When you opened her up to the northward of the light, as you have spoken, when you opened up the sight of her, then you say the barge was steering about north and you was steering about north by east? *A*. Yes, sir.

Q. 51. Now, as you approached the Berkshire, which way did she seem to be coming towards you? *A*. She was coming down, and kept turning toward us.

Q. 52. So that she kept coming nearer and nearer, head on all the time? *A*. Nearer, head on.

Q. 53. And did you continue to hold your course? *A*. I continued to hold our course and not to sag off any to the west at all.

Q. 54. You are acquainted with the channel down there? *A*. Yes, sir.

Q. 55. How much water was there to the westward of your tug and of the tow? *A*. You mean in width or in depth?

Q. 56. In width, of a vessel drawing fifteen feet of water, we will say, — the extreme depth of the Berkshire? *A*. At that point the channel was about twelve hundred feet wide, and we were four hundred feet from the light, which would give them about eight hundred feet to the west, clear water.

Q. 57. And your barge, you say, was not to the westward of your tug at all. *A*. The barge, I should say, was to the eastward of the centre of the channel.

Q. 58. And which way with reference to the tug? *A*. Well, she bore north. She was heading north and we were heading north by east.

Q. 59. So that there was more than half of the channel to the west of both the tug and the barge all the time, for the Berkshire to have taken, was there? *A*. Yes, sir.

Q. 60. Now, your vessel was going, you say, about two knots? *A*. Passing over the ground.

Q. 61. And how fast was the Berkshire apparently going when she came down towards you? *A*. I judged that she was going about eight knots.

Q. 62. Over the ground? *A*. Through the water. I judged that she was going eight knots through the water.

Q. 63. What course did she seem to be steering? *A*. She was coming down in the centre of the channel, but seemed to have a tendency to turn towards us.

Q. 64. To go towards you? *A*. Yes.

Q. 65. Did she seem to be coming towards you almost head on? *A*. If she came on in the course she was coming she would run into us at somewhere in the neighborhood of our foremast.

Q. 66. On which side? *A*. On our starboard side. I waited then as long as I dared to, to see if she would take the side I blowed to her to take, and found that we were going to come together, and righted our wheel and headed directly straight ahead of the barge.

Q. 67. That was the only change of course that you made? *A*. Yes, sir.

Q. 68. That was when a collision seemed to be imminent? *A*. It would have been if I hadn't done it. I done that to save the boat.

Q. 69. You thought all the time that he was going to obey the signal you gave him to go to the westward? *A*. Until I gave up all hopes of his doing it, and then I straightened the boat up.

Q. 70. By doing what? *A*. By starboarding our wheel.

Q. 71. And that brought your course to the northward? *A*. Brought her right straight ahead of the barge, as straight as she could.

Q. 72. That threw your tug directly ahead of the barge, did it? *A*. Yes, sir.

Q. 73. Up to that time the tug had been a little west of the barge? *A*. Up to that time the tug had been heading north by east.

Q. 74. And she now headed north? *A*. Yes.

Q. 75. How close did the Berkshire pass you? *A*. As near as I can judge, something about forty feet clear of her.

Q. 76. On which side of you? *A*. Passed on our starboard side.

Q. 77. And where were you in the channel with reference to the centre of the channel? *A*. Our tug was considerably on the eastern side of the centre.

Q. 78. And where were you with reference to the lighthouse? *A*. We were about four hundred feet, as near as I can judge, down channel from the red buoy.

Q. 79. Down channel from the red buoy, above the lighthouse? *A*. Yes, sir.

Q. 80. And in what direction did the red buoy bear from you? *A*. When we were heading north the red buoy would be off this way.

Q. 81. Over your starboard bow? *A*. Yes, sir.

Q. 82. About how many points? *A*. I couldn't say. I didn't notice. The times were too brisk to notice everything.

Q. 83. Did you notice, as the Berkshire went by you, whether she had reversed her engines at that time? *A*. As soon as I could see her stern I was satisfied that she was backing.

Q. 84. You saw the quick-water? *A*. Yes, sir.

Q. 85. As she passed you? *A*. Her stern hadn't passed us, but she came along within forty feet, and we could look back and see that quick-water, and then I was satisfied she was backing.

Q. 86. When did she commence to back? *A*. I couldn't say.

Q. 87. And as she went by you and you saw her stern, you saw there was quick-water? *A*. Yes, sir.

Q. 88. Did you notice whether her head paid off? *A*. When she went by us I didn't think there was any probabilities of a collision.

Q. 89. You thought she would pass the barge just as she had passed you? *A*. Yes, sir; and as she was going by I looked and saw our barge straight behind us, and as the Berkshire's bow went by our stern I saw her falling off a little, and then I was satisfied that there would be a collision and stopped the boat.

Q. 90. You didn't stop your boat until you saw she had passed you and her head was paying off? *A.* Her bow was past us.

Q. 91. And paying off. *A.* Yes, sir.

Q. 92. And then you stopped your engines? *A.* Yes, sir.

Q. 93. Did you see her strike the barge? *A.* As she went by and came to the barge I couldn't see exactly how she struck, because she shut the barge out from us.

Q. 94. Did you notice what she did after the collision? *A.* She went into that barge, as near as I can judge, on about an angle of two points, and I should think she was going into her at a speed of fully six knots; and then she backed — she kept backing, and before she left and got clear of the barge she was almost stern up, and pointed towards that lighthouse.

Q. 95. She backed our of her to the eastward towards the lighthouse? *A.* She backed, and the tide and the backing swung her around before she got clear of the barge, and her stern was almost pointing towards the lighthouse. And then she drifted right down by, and then he steamed right ahead and tried to turn his ship, and did after awhile and came up on the west side.

Q. 96. Then he drifted down between the barge and the light house? *A.* Yes, sir.

Q. 97. And came under the barge's stern and came up to the westward of her? *A.* He went down quite a piece.

Q. 98. How did he drift by! *A.* Nearly broadside; maybe a little angling, but not much.

Q. 99. So you think that the whole length of the Berkshire was nearly crosswise of the channel as she drifted down to the eastward of the barge between the barge and the lighthouse? *A.* Yes, sir. I don't think. That is so. There is no *think* about that.

Q. 100. How long was the barge in sinking after the collision? *A.* I should say about fifteen minutes.

Q. 101. How near the point where she was struck did she sink? *A.* I couldn't form any idea how much she went down, but I think some ways; possibly a hundred feet, and maybe a trifle more down stream; and the Berkshire going into her must have pushed her off some, so that she was a little further from the lighthouse when she sunk then when she was struck.

Q. 102. Now, Captain, I will ask you whether there was room enough for the Berkshire to have passed your tug and tow to the westward if he had obeyed your signal at all times? *A.* Plenty; oceans of room.

Q. 103. You are acquainted with the course which steamers take in going out of this river at that point? *A.* I am acquaiuted with the channel for fetching about eighteen or twenty feet of water; above that I am not.

Q. 104. What would have been the customary course for him to have taken if he had taken the usual way down the stream? *A.* The best way?

Q. 105. Yes. *A.* To keep off to the right. That is customary, and it is the rules of the road. It is the customary course for people I fall in with.

Q. 106. Is that the track that is usually followed by all the steamers going down this river? [*Objected to by* MR. CARVER.] *A.* Not only for this river but any other river; in any place where there is close shaving.

Q. 107. Now, Captain, was there room or not for him to have passed to the eastward of you? *A.* Well, the actual fact of his passing clear to the eastward of the tug showed that he could have gone to the east of the barge where there was the same room.

Q. 108. If he had held his course after passing you, would he have cleared the barge? *A.* If he had held his course he would have gone forty feet clear of the barge, the same as he did us.

Q. 109. Was there anything that you could have done, that you didn't do, to avoid this collision? *A.* Nothing that I know of.

Q. 110. Was there time, after he commenced to change his course so as to make a collision between him and the barge imminent, for the barge to have gotten out of the way? *A.* She didn't get out of the way.

Q. 111. Was there time to have done so after he commenced to change his course and throw his head around? *A.* I don't think she could have possibly got clear then. The only possibility was for the steamer to have kept far enough away to keep clear.

Q. 112. And if he had held his course and kept straight ahead, there would have been no trouble? *A.* No trouble.

Q. 113. To what do you attribute the collision? [*Objected to by* Mr. CARVER.] *A.* To three things: Neglecting to take the ordinary precautions of seamen in passing vessels, the utter disregard of the rules of navigation, and gross error in judgment at the point of danger.

Q. 114. What do you mean by neglecting to take the ordinary precautions of seamen? *A.* If he judged a collision imminent he should have slowed his ship and stopped and got clear of us, or given us a chance to get clear of him.

Q. 115. And negligence of the rules of the road. What do you consider a neglect of the rules of the road? *A.* Not answering our whistle; and if he couldn't answer, in not giving danger signals and going to the side that the whistle called for.

Q. 116. And bad judgment at the point of danger? *A.* In backing on his ship until her bow fell off. It was good judgment to back on the ship until the way was dead, and then gone ahead.

Q. 117. If he had gone ahead before his bow commenced to pay off, he would have gone clear of the tug and barge both? *A.* Yes, sir. At no time was the Berkshire in less than eighteen feet of water on the side that she was on.

Cross Examination by Mr. CARVER.

×-*Q.* 118. In other words, you think that the Berkshire backed too long, don't you? *A.* I don't say anything about that.

×-*Q.* 119. You think she was backing too long? *A.* In my judgment, if she hadn't backed long enough for her to pay off, and had gone ahead, she would have gone clear.

×-*Q.* 120. And you think the real cause was that the Berkshire kept on reversing her engine too long. Is that it? *A.* No; I don't think that that was the cause of it. The real cause was that she didn't go on the side she belonged on.

×-*Q.* 121. You have been talking about the rules of the road here. What rules on navigation do you understand apply here? Do you understand it is the International Rules? *A.* Such as we get from the inspectors.

×-*Q.* 122. You get these circulars from the Custom House, don't you? *A.* Yes, sir; and we have a book this shape.

×-*Q.* 123. These rules of the Custom House are printed in blue, and the other in black? *A.* Yes, sir.

×-*Q.* 124. Which do you think is proper? *A.* Leave that out, and go by the one furnished by the inspectors; but that does apply the same, though.

×-*Q.* 125. You don't find any law in the inspectors' rules which says that a vessel shall go on the right-hand side of the channel, do you? *A.* Vessels meeting end on, the one that desires to go one side gives a whistle.

×-*Q.* 126. It also says that vessels meeting end on, or nearly end on, shall proceed to the right, don't it? *A.* I don't remember particularly about that. If they are meeting end on, and there is no obstacle in the way, it is customary to go to the right.

×-*Q.* 127. You understand that good seamanship requires that a vessel should not go across another one's bow, don't you? *A.* Under circumstances it would, and under others it wouldn't.

×-*Q.* 128. And if you can pursue one of two courses, one going across the bow of the vessel and another across the stern, that it is undesirable to cross the bow? *A.* It is according to where you are.

×-*Q.* 129. Do you think it would be good judgment to cross the bow of the vessel in the river? *A.* Where the channel is wide enough, my judgment is that that vessel should keep off to the right. and go down where she has got plenty of room to pass.

×-*Q.* 130. You say you blew one whistle to the Berkshire, didn't you? *A.* Yes, sir.

×-*Q.* 131. How long do you think that was before the collision? *A.* I don't know as to time; I kept no time at all.

×-*Q.* 132. Do you think she was three quarters of a mile off? *A.* When we blew the whistle?

×-*Q.* 133. Yes. *A.* About that.

×-*Q.* 134. You didn't get any reply? *A.* No, sir.

×-*Q.* 135. You didn't repeat your whistle? *A.* No, sir.

×-*Q.* 136. Didn't blow any danger signal? *A.* No.

×-*Q.* 137. From all you could learn, the Berkshire didn't hear your signal? *A.* I don't know anything about that. Before we blew our signals the Berkshire and another vessel passed. We heard both of those signals distinctly, and we waited until that sound had all died away so that there could be no conflict with our signal before we blew our blast.

×-*Q*. 138. You say you blew one whistle and got no reply? *A*. Yes.

×-*Q*. 139. And that you didn't repeat that signal? *A*. No.

×-*Q*. 140. And you didn't blow any danger signal at any time? *A*. No, sir; didn't think there was any danger until she came in where to avoid the collision we had to straighten up. Then even after we straightened up I didn't think there was going to be any collision. I thought that the Berkshire would go down by us clear, until her bow fell off. That was the first time I thought there was really danger of collision.

×-*Q*. 141. You didn't reverse the engine on your ship at any time? *A*. No.

×-*Q*. 142. You didn't think it was necessary? *A*. No.

×-*Q*. 143. You didn't think there was any danger of a collision at all, did you? *A*. I told you I didn't think there was any danger of a collision until their bow commenced to fall off.

×-*Q*. 144. Until the Berkshire had passed? *A*. Her bow was past our stern. She wasn't clear by.

×-*Q*. 145. How many points do you think the Berkshire's bow fell off to starboard? *A*. I couldn't tell. I didn't notice. I noticed that she began to swing off.

×-*Q*. 146. Do you think she went off as much as two points? *A*. I don't think it had gone off as much as that even, when she had struck the vessel. It might have been a point and a half, possibly. He had only the forty feet —

×-*Q*. 147. Wait a minute. Now, you say that the bow of the Berkshire did not, in your opinion, swing off to the starboard until she was abreast of you? *A*. The bow of the ship, the first I noticed of her swinging off, was about abreast our stern.

×-*Q*. 148. And she swung off a point and a half between the time that elapsed between the time her bow was abreast of your stern up to the time of the collision. *A*. I don't know that it was a point and a half. When she passed us she was almost straight in line.

×-*Q*. 149. Almost going the opposite direction from what you were? *A*. Almost in a straight line; yes.

×-*Q*. 150. In your opinion she swung off to the starboard, after she passed you, about one and a half points? *A*. I should judge that.

×-*Q*. 151. Up to the time of the collision? *A*. Yes.

×-*Q*. 152. And you say that you think you were going ahead about two miles an hour? *A*. Yes; but when the Berkshire was there we had stopped.

×-*Q*. 153. The barge was going ahead about two miles an hour? *A*. She had been. She had lost her way somewhat, probably; not much.

×-*Q*. 154. How fast do you think the Berkshire was going at the time of the collision? *A*. Well, I judge about six knots.

×-*Q*. 155. Six knots over the ground or — *A*. Six knots through the water.

×-*Q*. 156. How much do you think the tide was at that time — the ebb tide? *A*. In strength, you mean?

×-*Q*. 157. Yes. *A*. About a knot and a half.

×-*Q*. 158. In other words, you think the two vessels at that time were approaching each other at the rate of ten knots an hour? *A*. About that; between nine and ten.

×-*Q*. 159. And you think it was three hundred feet from the stern of your towboat to the bow of your barge? *A*. Yes.

×-*Q*. 160. So that the two vessels were approaching each other at the rate of about a thousand feet a minute? *A*. I don't know about the figures. If that is what it amounts to, that is what it was in my judgment.

×-*Q*. 161. Have you ever been on ocean steamers like the Berkshire? *A*. How do you mean? Ever been aboard of them?

×-*Q*. 162. I mean have you ever been in command. *A*. Yes; I have been in command of four or five times as big as the Berkshire.

×-*Q*. 163. Do you know how long it takes for a vessel like that to swing a point? *A.* No, sir. They swing pretty fast under some circumstances, and others they can't swing so fast.

×-*Q.* 164. When they commence to swing it takes for the first point pretty near a minute, don't it? *A.* I don't know anything about that. No; it don't take a minute.

×-*Q.* 165. Not by reversing the engines? *A.* No.

×-*Q.* 166. A half a minute? *A.* I don't know anything about the time. I never timed one. But I know it don't take any minute.

×-*Q.* 167. How long does it take for your tug to go a point? *A.* I never timed her. Under some circumstances pretty quick, and not so quick at other times.

×-*Q.* 168. A tug will go quicker than a steamer? *A.* Yes, sir; they do.

×-*Q.* 169. A tugboat moves quicker than any other steam vessel, don't she? *A.* No; there are other vessels that may go faster.

×-*Q.* 170. Have you ever towed vessels into a harbor by laying alongside of them? *A.* Yes.

×-*Q.* 171. You can do that perfectly well in the Providence River, can't you? *A.* It can be done.

×-*Q.* 172. You have done it? *A.* I think so.

×-*Q.* 173. Done it since this collision, haven't you? *A.* I couldn't say whether we have or not; but we have once or twice before the collision, I remember.

×-*Q.* 174. How many times since you have been on this tug have you been into Providence Harbor? *A.* I couldn't tell you; but plenty of times. That is the nearest I can come to it.

×-*Q.* 175. There wasn't anything that day to prevent you going alongside of the barge and towing her up in that way, was there? *A.* I don't think there was.

×-*Q.* 176. You could have done that just as well as shortening the hawser, couldn't you? *A.* No, sir; I couldn't. If I could I would have done it.

×-*Q.* 177. It was more convenient to shorten the hawser, wasn't it? *A.* We have to shorten the hawser in either case.

×-*Q.* 178. But you could have done it? *A.* I know I could have done it. I could have gone down and towed up a whole lot of others. And we could have gone the other side of the river, but we didn't do it. We kept the rules of the road and kept on the right side. If the Berkshire had done the same we wouldn't have been here now.

×-*Q.* 179. You have read the steamboat inspector's rules? *A.* Yes.

×-*Q.* 180. Have you read that rule that was passed in May, '93? *A.* I don't know as I have looked at that at all. I have what suggestions are given to me from the Custom House.

×-*Q.* 181. Did you get one from the Custom House in '93? *A.* No. The Boston people were too much behindhand. When we inspected in Boston they didn't give us one.

×-*Q.* 182. Then you at this time didn't know the rule that was promulgated in May, '93? *A.* I don't know. I never saw any book that was printed in May, '93. If there was any fault it was the fault of the Boston inspectors. We inspected there, and they didn't give us any.

×-*Q.* 183. Did you ever hear in regard to any rule about steamers going up a river, that was passed in May, '93? *A.* I couldn't say that I did.

×-*Q.* 184. Anything in regard to the right of way between vessels going out and vessels coming in? *A.* I don't think so.

×-*Q.* 185. Which vessel, do you understand, has the right of designating the course when one steamer is going out and the other coming in? *A.* The one that asks the question first — that blows first.

×-*Q.* 186. Don't you understand that if you blow one whistle you should wait for an answer before you attempt to follow the whistle? *A.* In some cases, but in this case, no; because I had hauled over that side before I blew that whistle, and didn't leave any chance for a man to ask any questions about it.

×-*Q.* 187. So that you took the course and blew the whistle afterwards. *A.* I took the course; yes.

×-*Q.* 188. And blew the whistle? *A.* Yes; and gave him plenty of room to stop his ship.

×-*Q.* 189. But there is no doubt about that fact that you changed your course to starboard first and blew your whistle afterwards? *A.* No.

×-*Q.* 190. And you never received any answer from him? *A.* No.

×-*Q.* 191. And never blew it again, and never blew any danger signal? *A.* Didn't think there was any necessity.

×-*Q.* 192. You understand the danger signal is three blasts, don't you? *A.* Three or four. I didn't think there was any danger until their vessel came up there, and her bow was even with my stem before I considered there was imminent danger.

×-*Q.* 193. If you had considered there was any danger before she came up to you, you could have prevented the collision? *A.* If he had answered my signals, or given me danger signals soon after he got mine, I could have gone the other side of the river.

×-*Q.* 194. If you had known there was any danger of a collision before the Berkshire got abreast of you, you could have prevented the collision well enough? *A.* If I had known about it far enough. If I had known when she left the dock that she was going to run into us, I could have kept clear of her; but I didn't expect it.

×-*Q.* 195. Suppose you had thought, at the time that the Berkshire was one length ahead of you, that there was liable to be a collision, could you have prevented it? *A.* No, I couldn't; not the way she went; nothing that I could have done.

×-*Q.* 196. But the barge could have prevented it by putting her helm hard a-starboard? *A.* I don't know what the barge could have done.

×-*Q.* 197. Don't you think she could? *A.* No, I don't.

×-*Q.* 198. What do you think would have been the effect of putting her helm hard a-starboard at that time? *A.* If she had had time enough, it would have had a tendency to turn the bow off.

×-*Q.* 199. And prevent the collision? *A.* No; if she is going to run into her anyway, I don't see how it would have prevented a collision.

Direct Examination resumed by MR. ROELKER.

Q. 200. When you changed your course to starboard and then blew the whistle, how long after your change of course to starboard did you blow the whistle? *A.* I couldn't tell you about the time, but we went clear up to that lighthouse.

Q. 201. I say how long after you changed your course, when you were down below the light, was it that you blew your whistle? Was it close together or not? *A*. Near the time; a distance of half way from that black buoy to that lighthouse, before we blew the whistle, and everything was straightened up behind us.

Q. 202. You were on the easterly side of the channel before you blew your whistle? *A*. Certainly.

Q. 203. And when you blew your whistle he was three quarters of a mile away? *A*. Yes.

Q. 204. And she had just passed the Bay Queen that went up? *A*. Yes, sir.

Q. 205. Port to port? *A*. Yes, sir.

Q. 206. And he was on the westerly side of the channel? *A*. Yes.

Q. 207. When you blew the whistle? *A*. Yes, sir.

Q. 208. When you blew the whistle he was on the westerly side of the channel and you were on the easterly side? *A*. Yes, sir.

Q. 209. And three quarters of a mile apart? *A*. Yes.

Cross Examination resumed by Mr. CARVER.

×-*Q*. 210. You say that all this time the Berkshire bore on your starboard bow? *A*. Yes.

Mr. ROELKER. Do you mean that she bore on your starboard bow just before the collision when she was coming down, or was it nearly head on? *A*. She was coming head on, and this changing that one point gave us that forty feet space we had.

×-*Q*. 211 (*by* Mr. CARVER). But a little on the starboard bow all the time? *A*. On the range of that river she could be nowhere else.

Direct Examination resumed by Mr. ROELKER.

Q. 212. That is, there is a crook in the river just above there? *A*. Certainly.

Q. 213. And the channel points off to the northeast? *A*. Yes. The actual course up this channel that we were going is north three quarters west. The course of the channel she was coming was northeast and southwest.

Q. 214. At the point of turning there is a red buoy, isn't there? *A.* Yes.

Q. 215. And she was at the northward of the red buoy all the time, and you were at the southward until just before the collision? *A.* Yes.

Q. 216. And therefore all that time she could be nowhere else except on your starboard bow? *A.* Certainly not.

Q. 217. And her course until she got to the red buoy would be what? *A.* Until she got down the direction of the channel would be about southwest.

Q. 218. Her course would be nearly southwest? *A.* Yes.

Q. 219. While yours was north by east? *A.* We steered north by east and held this course. The actual course was north three quarters west.

Q. 220. When she came down and passed the red buoy, and came towards you, then she was nearly head on? *A.* Not quite head on, but nearly so.

Q. 221. And then you sheered and straightened your vessel up, going to the northward, and passed her? *A.* Which gave us that forty-foot space.

Cross Examination resumed by Mr. CARVER.

×-*Q.* 222. When you went around this bend in the channel, you went around on the arc of a circle, didn't you? *A.* Hadn't been around the bend. It was the Berkshire that was doing the bending.

Direct Examination resumed by Mr. ROELKER.

Q. 223. The bend is at the red buoy, isn't it? *A.* That was the actual point, but we hadn't got to it.

DEPOSITION OF JOHN W. FARRELL.

Direct Examination by Mr. ROELKER.

Q. 1. How long have you been mate? *A.* On this boat?

Q. 2. Yes. *A.* Two years in June or July; along there.

Q. 3. And how long before that were you mate on other steam vessels? *A.* Five years.

Q. 4. So you have been seven years mate on steam vessels? *A.* Yes, sir.

Q. 5. And you were mate of the tug N. & W. 1 at the time of this collision? *A.* Yes, sir.

Q. 6. Do you remember anything about shortening the hawser that day? *A.* Yes, sir.

Q. 7. What was done? *A.* We began off of Bristol to shorten up, and they got in part of it on the barge, and then the machinery broke down and we took in the balance of it on our boat with our gipsy.

Q. 8. And what did you shorten her down to, if you know? *A.* In the neighborhood of fifty fathoms; about that.

Q. 9. Was that the usual harbor length for towing? *A.* Yes; just about the usual length that we tow them coming into harbors.

Q. 10. Is that the length that is usually used by tugs along the Atlantic coast? *A.* Yes, sir; tugs in my experience.

Q. 11. And in your observation? *A.* Yes.

Q. 12. And what harbors do you usually tow in with that length? *A.* New York, through the Gate, New Haven, Providence, Boston, Norfolk, and in fact all harbors that we go into.

Q. 13. After you got this line shortened up to about fifty fathoms, what did you do then? *A.* We came on. Our engineer went aboard of the barge to see what was the matter with the machinery. Then we came on.

Q. 14. Came on along up the river? *A.* Yes, sir.

Q. 15. Where were you on the tug? *A.* In the pilot house.

Q. 16. Were you at the wheel? *A.* Yes, sir.

Q. 17. What was the first that you noticed of the Berkshire coming down? *A.* She was somewhere in the vicinity of Pomham.

Q. 18. And where were you? *A.* We were a little to the southward of Sabin's Light at that time.

Q. 19. When you saw her, which side of the channel was she on, apparently? *A.* Well, I couldn't judge about that. She was coming down. She hadn't got into our range.

Q. 20. You couldn't tell at that time? *A.* No.

Q. 21. Which side of the channel were you? *A.* We were going up about the middle.

Q. 22. Now, did you take -any steps to go over on to the starboard side of the channel? *A*. As we approached we blowed our whistle.

Q. 23. Which side of the channel did you go on to? *A*. We were going on to the east side.

Q. 24. Where-bouts were you when you blew your whistle? *A*. Very near up abreast of Sabin Light.

Q. 25. And where was she? *A*. She was somewhere in the vicinity of the black buoy; not quite to it; I should judge about a half a mile from us.

Q. 26. And on which side of the channel was she then? *A*. I should judge she was pretty well over towards the black buoy.

Q. 27. Towards the western side of the channel? *A*. Yes.

Q. 28. Did you notice her pass the Bay Queen? *A*. Yes, sir.

Q. 29. Did you notice any signals exchanged between them? *A*. Yes, sir; saw the escape of the steam.

Q. 30. Heard the signals? *A*. Yes, sir.

Q. 31. What signals did they exchange? *A*. One each.

Q. 32. And they passed which side? *A*. Port to port.

Q. 33. And after they passed, you saw the Berkshire on the westerly side of the channel near the black buoy? *A*. Yes, sir.

Q. 34. You then gave her one blast of your whistle? *A*. Yes, sir.

Q. 35. Which signified what? *A*. To keep to starboard; pass port to port.

Q. 36. The same as the others? *A*. Yes.

Q. 37. And you think she was then about a half a mile off? *A*. Yes.

Q. 38. Did she answer your signal? *A*. She did not.

Q. 39. At what rate of speed were you going? *A*. About two miles an hour.

Q. 40. What rate do you think she was going at? *A*. In the neighborhood of six; maybe over.

Q. 41. The stream was all clear then between you and the Berkshire? *A*. Yes.

Q. 42. There was nothing else in the way? *A*. Nothing.

Q. 43. When you gave this signal you say you were nearly up to Sabin's Point lighthouse? *A.* Yes, sir.

Q. 44. How far from the light, should you say? *A.* Well, six hundred feet.

Q. 45. Within six hundred feet of the light? *A.* Yes, sir; about that, I should judge.

Q. 46. And what course did you steer? *A.* When we came up towards the red buoy we were heading about north by east.

Q. 47. And how was the barge steering behind you? *A.* She was following pretty well after us.

Q. 48. Right along after you? *A.* Yes.

Q. 49. Now, when you first saw the Berkshire, you saw her to the eastward of Sabin's Point Light, I suppose, over your starboard bow, when you were down below there? *A.* Yes, sir. She was in the vicinity of Pomham when I first saw her.

Q. 50. By your range of vision when you were down to the westward of Sabin's Point Light, it brought her to the eastward of the light? *A.* Yes, sir.

Q. 51. She kept coming towards you as she came down, and after she passed the red buoy how did she head with reference to you? *A.* I should think she was heading south west half south.

Q. 52. After she passed the buoy? *A.* When she was coming up with us.

Q. 53. The red buoy is where you turned, isn't it? *A.* Yes.

Q. 54. Before she passed the buoy how was she heading? *A.* She was heading then about southwest, half south.

Q. 55. Before she turned the buoy? *A.* Yes.

Q. 56. After she turned the buoy how was she? *A.* Then I couldn't see her, only as she was passing us, because I was at the wheel.

Q. 57. How close was she to you before you changed your course? *A.* Very nearly abreast of us. Before I changed our course, before she came up to us, the captain told me to keep her off. He saw that a collision was imminent between the two boats, and he told me to keep her off; and I straightened her up about north, as near as I can judge.

Q. 58. And then she passed to the starboard of you? *A*. Yes.

Q. 59. How close to you? *A*. Thirty-five or forty feet.

Q. 60. Just cleared you? Yes.

Q. 61. And you had straightened up by putting your helm to starboard? *A*. Yes, sir.

Q. 62. Now, did you notice as she passed you whether she was backing or not? *A*. I wasn't paying attention to her. I was looking ahead, on account of our own boat.

Q. 63. Whereabouts were you in the channel when she passed you in that way? *A*. We were probably three hundred feet, or a little over, from the red buoy.

Q. 64. Three hundred or a little over from the red buoy? *A*. Yes, sir; three hundred feet.

Q. 65. Which way did the red buoy bear from you? *A*. It was over our starboard bow. I didn't take any bearings of it.

Q. 66. Then you were about half way between the red buoy and the lighthouse? *A*. Just about, as near as I can guess.

Q. 67. You hadn't got to the turn in the channel? *A*. No, sir.

Q. 68. After she had passed you did you notice which way she headed? *A*. No, sir; I didn't.

Q. 69. You didn't look around at her at all? *A*. No, sir. I paid attention to our own boat.

Q. 70. After she struck the barge did you look to see what the Berkshire did? *A*. No.

Q. 71. You don't know which side of the barge she went down? *A*. No, sir.

Q. 72. You are familiar with the channel down there? *A*. Yes,

Q. 73. Was there plenty of water for her to have passed to the westward of you? *A*. Plenty of it, sir.

Q. 74. At all times? *A*. At all times; plenty of it.

Q. 75. Was the barge over to the westward of the centre of the channel after you blew your one whistle? *A*. I don't think she ever was. I think if anything she was to the eastward of the channel.

Q. 76. How about the tug? *A*. The tug never was.

Q. 77. The tug and the barge were both to the eastward of the centre of the channel all the time? *A*. If anything they were to the eastward of the channel. That is my opinion.

Q. 78. Now, was there, or not, water enough for him to have passed to the eastward of you and cleared both the tug and the barge? *A*. Yes, sir.

Q. 79. He could have passed either side if he had held his course? *A*. Yes, sir.

Q. 80. How fas did he seem to be going when he passed your tug? *A*. Well, he was going at a good rate of speed; I couldn't say how fast. He was going a good rate of speed when he passed.

Q. 81. Did you stop your tug? *A*. Yes, sir.

Q. 82. When was that? *A*. When he was about abreast of us.

Q. 83. When he was about abreast of you you stopped your tug? *A*. Yes.

Q. 84. Was there anything that you could have done aboard the tug to have avoided this collision besides what you did do? *A*. No, sir; I don't think there was, in my judgment.

Q. 85. Was there anything that the barge could have done to have avoided it, that you know of? *A*. No, sir.

Q. 86. Do you know where the barge was immediately before the collision, with reference to the tug? *A*. She was following just as nigh as she could after it.

Q. 87. Directly behind you? *A*. Yes.

Q. 88. Do you know how she was pointing with reference to you—whether the same way or different? *A*. She was pointing very near as we were.

Cross Examination by Mr. Carver.

×-*Q*. 89. You think that the tug and the barge were about in the centre of the channel all the time, didn't you? *A*. Very nearly.

×-*Q*. 90. Where was your vessel heading by the compass when you first saw the Berkshire? *A*. Well, I couldn't say when I first saw her. Sometimes we go a good deal by our eye going up there, on account of the barge swinging one way or the other.

×-*Q*. 91. How were you heading when you blew the one whistle? *A*. I couldn't say as to that.

×-*Q*. 92. You had a compass before you, I suppose? *A*. Yes, sir; but I would look at it and then pay no attention to it, from the swing of the tide—

×-*Q*. 93. The captain wasn't in the pilot house, was he? *A*. No, sir; not at that time. He was outside.

×-*Q*. 94. You could tell the compass course better than any other man, couldn't you? *A*. I could tell when I was steering it.

×-*Q*. 95. Do you know how you were heading when the collision took place? *A*. About north.

×-*Q*. 96. And how was you heading before you changed your course? *A*. North by east.

×-*Q*. 97. And how long had you been steering north by east? *A*. Well, probably eight minutes.

×-*Q*. 98. And how had you been heading before that? *A*. Our course in going up, if we steer it, — we don't always have it right on the point, — if we steer it we would be heading north by east, or something like that.

×-*Q*. 99. You were just getting ready to go around this bend in the river? *A*. Yes.

×-*Q*. 100. Had you started to go around it? *A*. No.

×-*Q*. 101. Just going to? *A*. We were not up to the place where we could do it.

×-*Q*. 102. Are you in this tug now? *A*. Yes, sir.

×-*Q*. 103. And you have been up Providence River a number of times? *A*. Yes, sir.

×-*Q*. 104. You are a licensed pilot, I suppose? *A*. Yes, sir; have been for eight years here.

×-*Q*. 105. And you have often towed barges with a tug by being alongside of the barge, haven't you? *A*. Very seldom; once in a great while.

×-*Q*. 106. You have done it with this boat several times, haven't you? *A*. Not several times; no, sir.

×-*Q*. 107. How many times? *A*. Well, I don't think since I have been in the boat we have towed alongside more than twice.

×-*Q*. 108. You could have done it this time if you had wanted to, just as well as not? *A*. Oh, yes; if it is not rough we can do it.

×-*Q*. 109. It was smooth at that time, wasn't it? *A*. Yes.

×-*Q*. 110. When you tow alongside of a barge which side do you go on? *A*. We generally have her on our port side.

×-*Q.* 111. In other words, you keep your starboard side clear? *A.* We can handle her better on the port side than on the starboard.

×-*Q.* 112. A tug like yours can handle a barge very well alongside of her? *A.* Our barge was a pretty good sized barge. You can some barges very well, and some you can't.

×-*Q.* 113. You could this one, couldn't you? *A.* We can't handle as well, in my opinion, as we can on a hawser. I would rather take ten tows through the Gate on a hawser than to take one alongside.

×-*Q.* 114. You didn't fear any collision between your vessel and the Berkshire, did you? *A.* Not until he got very close to us.

×-*Q.* 115. How close? *A.* Well, probably fifty or seventy-five feet.

×-*Q.* 116. When the Berkshire was seventy-five feet from your tug you thought there was going to be a collision, did you? *A.* Well, I don't say seventy-five feet.

×-*Q.* 117. I mean somewhere in that neighborhood. You thought there was going to be a collision? *A.* The captain did. I did.

×-*Q.* 118. And you did? *A.* Yes.

×-*Q.* 119. When you saw that the Berkshire went clear of you, you didn't anticipate any collision with the barge, did you? *A.* Not at all.

×-*Q.* 120. It was a surprise to you, wasn't it? *A.* Yes, sir.

×-*Q.* 121. And the captain of the tug didn't do anything to prevent a collision in any way? *A.* He had done all that he could before. He had stopped his boat.

×-*Q.* 122. But after he found that the Berkshire was abreast of him he felt easy and didn't do anything? *A.* He stopped his boat when she was abreast of him.

DEPOSITION OF W. L. ARMSTRONG.

Direct Examination by Mr. Roelker.

Q. 1. You were second mate of the tug, Mr. Armstrong? *A.* Yes, sir.

Q. 2. At the time of this collision? *A.* Yes, sir.

Q. 3. This wasn't your watch? *A.* No, sir.

Q. 4. And you were not on deck at the time of the accident. You were asleep below, I believe? *A.* Yes, sir.

Q. 5. Were you on deck when the hawser was shortened? *A.* Yes, sir.

Q. 6. Just tell us what happened. *A.* Well, at the time the barge started to shorten the hawser down by Bristol the engine broke down, the windlass, and then we finished with our windlass.

Q. 7. How long did you leave the hawser when you got through shortening it up with your windlass? *A.* About twice the length of the boat.

Q. 8. Twice the length of what boat? *A.* The tugboat.

Q. 9. How long is the tugboat? *A.* It is one hundred and thirty-five feet, I believe.

Q. 10. Then that would be, in fathoms, about forty-five to fifty fathoms, you would think? *A.* Yes, sir.

Q. 11. I will ask you whether that is the ordinary length of the hawser in towing in harbors. *A.* About usual — what we always had in other harbors.

Q. 12. What harbors have you towed in in that way? *A.* New York, Boston, New Haven, New Bedford, Portland.

Q. 13. How long have you been in tugboats? *A.* I was on this boat only three years. I was on a boat for eighteen months before this.

Q. 14. Now, you say you were asleep on the tug at the time this accident happened? *A.* Yes, sir.

Q. 15. When did you wake up? *A.* When the accident occurred and the tug stopped.

Q. 16. Was you up at the time the Berkshire struck the barge? *A.* That was before she struck.

Q. 17. Before she struck the barge? *A.* Yes, sir.

Q. 18. Just a minute before, I suppose? *A.* When the engine stopped I got up and went aft. The Berkshire was about half a length from the barge then, I should judge.

Q. 19. How was the Berkshire's head? *A.* Her head was pointing very near for the barge's stern, but she was backing and slewing her head around all the time.

Q. 20. Backing her engine? *A*. Yes.

Q. 21. And that kept slewing her head around toward the barge's bow all the time? *A*. Yes.

Q. 22. When you first saw her she was pointing about towards the barge's stern? *A*. Yes.

Q. 23. And about half a length from her? *A*. Yes.

Q. 24. And when they came together where did she strike her, if you saw it? *A*. Struck her right on the starboard bow.

Q. 25. At about what angle? *A*. About like that [*illustrating*].

Q. 26. About how many points? One or two points, more or less? *A*. It was all of two points, I guess.

Q. 27. About two points, you should think? *A*. Yes.

Q. 28. Now, after she had struck her in that way, what did the Berkshire do? *A*. She backed out, and went around the barge's stern, and came around and came up the river.

Q. 29. Which way did she back? *A*. She backed to port.

Q. 30. Towards the lighthouse? *A*. Yes, sir.

Q. 31. How did she lay in the stream there when she was backing in the way? Which way was she pointing? *A*. How was the Berkshire pointing?

Q. 32. Yes. *A*. Well, she was pointing more across the river when she was backing.

Q. 33. Across the river? *A*. Yes, sir.

Q. 34. Pointing back towards the lighthouse more? *A*. Yes.

Q. 35. And you say she backed out towards the lighthouse across the river, and went down between the barge and the lighthouse, and went under the barge's stern. Is that it? *A*. Yes, sir.

Q. 36. How near to the place where she was struck did the barge sink, if you know? *A*. Well, the barge drifted back a little, I think; maybe half a length, or maybe a length.

Q. 37. Did she drift any to the westward, do you think? *A*. Yes, sir; I think she did.

Q. 38. How much? *A*. I should say a hundred feet.

Q. 39. How long did it take her to sink? *A*. About ten minutes, I should judge.

Q. 40. How did she go down? *A*. The bow went down first.

Cross Examination by Mr. CARVER.

×-*Q.* 41. You have been on tugboats when they have towed barges up streams into harbors by lying alongside of them, haven't you? *A.* Alongside of them? Yes, sir; we have, alongside of them.

×-*Q.* 42. And you have been on this tug when she has towed barges up Providence River by laying alongside of them? *A.* Yes, sir.

DEPOSITION OF THOMAS BENSON.

Direct Examination by Mr. ROELKER.

Q. 1. You were a sailor on board the tug, Mr. Benson? *A.* Yes, sir.

Q. 2. At the time of the collision? *A.* Yes.

Q. 3. How long have you been a sailor on steam vessels? *A.* This is the first boat I have been on.

Q. 4. How long have you been on her? *A.* I was eight months today, since I came aboard of her.

Q. 5. You are a Norwegian? *A.* Yes, sir.

Q. 6. Do you remember anything about shortening up the hawser that day? *A.* Yes, sir.

Q. 7. Please tell us what was done. *A.* We started to shorten up the hawser, and the boat blew three whistles for shortening up, and they started to shorten up on the barge; and when they got about half of it in, I should think, the windlass broke down, the barge's windlass, and Mr. Simpson went aboard and tried to fix it so he could bring in the rest of the hawser. The captain told us to hitch the hawser to our windlass and bring in the rest of it, and we hauled in until the captain told us that was enough. That was the shortest hawser we use in going into harbors.

Q. 8. How long was it? *A.* I should judge about twice the length of the boat, sir.

Q. 9. Of the tugboat? *A.* Yes, sir.

Q. 10. It was about the usual length that you use? *A.* Yes, sir; use on that boat. I have been in no others.

Q. 11. When did you go on deck after you got up towards Sabin's Point? *A.* I got on deck when I heard some noise on deck, and I came up on deck. I thought there was something to pay, because there was lots of noise. I saw the Berkshire. Her bow was into the barge. That was the first time I saw it.

Q. 12. You didn't get up until the Berkshire's bow was in the barge? *A.* No, sir.

Q. 13. Did you hear the tug blow? *A.* Yes, sir; blowed one whistle.

Q. 14. Where were you then? *A.* I was just on the port side, sir, going down below. I was about amidships when the whistle blew.

Q. 15. And where was the boat then? *A.* She wasn't quite up to the lighthouse.

Q. 16. Where was the Berkshire? *A.* I don't know.

Q. 17. You didn't stop to see her? *A.* No.

Q. 18. Did you hear any answer to the whistle? *A.* No, sir.

Q. 19. And you went below? *A.* Yes, sir.

Q. 20. And when you came on deck again the Berkshire was just running in? *A.* She was into the boat then.

Q. 21. Did you see her back off? *A.* Yes, sir; she backed off.

Q. 22. Which side did she back off? *A.* She backed off towards the lighthouse — a little that way.

Q. 23. Did she drift down between the barge and the lighthouse? *A.* I couldn't tell, sir. I went to work on the hawser.

Q. 24. Pulling it in? *A.* Yes, sir.

Q. 25. Had it been broken off in the collision? *A.* Yes, sir.

Q. 26. You saw her backing off towards the lighthouse, and that is all you can say about it? *A.* Yes, sir.

Q. 27. Whereabouts were you in the channel when you went below? Which side of the channel going up? *A.* We were closer to the lighthouse on that side than we were on the other side.

Q. 28. Closer to Sabin's Point lighthouse? *A.* Yes, sir.

Cross Examination by Mr. Carver.

×-*Q.* 29. When you took the hawser in on the tug, you took it in with the hand winch? *A.* No, sir.

×-*Q*. 30. Steam winch? *A*. Yes, sir.

×-*Q*. 31. Who tended the winch? *A*. The second mate, sir.

×-*Q*. 32. Now, when you went below how many men did you leave on deck? *A*. I couldn't tell you, sir.

×-*Q*. 33. Any man forward? *A*. I couldn't tell that, sir.

DEPOSITION OF JOHN H. O'ROURKE.

Direct Examination by Mr. Roelker.

Q. 1. Where were you aboard the tug when the collision occurred? *A*. Fireman.

Q. 2. Do you know anything about the hawser being shortened? *A*. Yes, sir; we were shortening down by Bristol.

Q. 3. How much was left out? How long was the line when you got through shortening? *A*. About twice the length of the tug.

Q. 4. Do you know whether that was the ordinary length for towing in harbors or not? Yes, sir; I guess it is about the ordinary length.

Q. 5. Do you know anything about the engine breaking down on the barge? *A*. Well, I heard some one say that the engine broke down, and they couldn't get in any more of the hawser.

Q. 6. What was done after that? *A*. I believe we took in some of it then.

Q. 7. You took in some? *A*. Yes, sir.

Q. 8. On board of the tug? *A*. Yes, sir.

Q. 9. Now, do you know anything about a signal being given to slacken speed down there? *A*. Yes, sir.

Q. 10. Where was that? *A*. It was going along towards Sabin's Point.

Q. 11. Down below Sabin's Point Light? *A*. Yes, sir.

Q. 12. Do you know anything about any signal being given by the steamer? *A*. What steamer?

Q. 13. By the tug. *A*. Yes, sir; we blew one whistle.

Q. 14. You blew one whistle? *A*. Yes, sir.

Q. 15. Where were you when you blew that? *A*. Going on towards Sabin's-Point.

Q. 16. Just below the light? *A*. Yes, sir.

Q. 17. Which side of the channel were you? *A*. I didn't exactly take notice.

Q. 18. Pretty close up to the light, were you, when you passed it? *A*. Passed what?

Q. 19. Passed Sabin's Point lighthouse. *A*. We were pretty close to the light when we passed it, to the right of the channel.

Q. 20. And when you blew one whistle did you hear the Berkshire give any answer? *A*. No, sir; I did not.

Q. 31. How far was she away? *A*. When we blew the whistle?

Q. 22. Yes. *A*. I guess very near a half a mile.

Q. 23. How fast was the Berkshire coming as she came down? *A*. I should judge she was coming about five or six miles an hour. I should judge that.

Q. 24. When she passed the tug how close did she pass to her? *A*. I should judge about sixty or seventy feet; something like that.

Q. 25. Did you see her strike the barge? *A*. Yes, I saw her strike the barge.

Q. 26. Whereabouts did she strike her? *A*. On the starboard bow.

Q. 27. Did you notice whether her head paid off towards the barge or not? *A*. No, sir.

Q. 28. Didn't notice about that? *A*. No, sir.

Q. 29. Did you notice whether a signal was given to stop the engine on the tug? *A*. Yes, sir.

Q. 30. It was given? *A*. Yes, sir.

Q. 31. Whereabouts was the Berkshire when that signal was given? *A*. To stop the engine?

Q. 32. Yes. *A*. She was about abeam of us, I guess; somewhere along there.

Q. 33. Now, did you notice the Berkshire back out? *A*. Well, sir, I was looking at it backing out.

Q. 34. Which way did she swing out? *A*. I think her stern swung towards the light.

Q. 35. Towards the lighthouse? *A*. Yes, sir.

Q. 36. How did she back? *A*. Kind of a drift like; side down the stream.

Q. 37. She drifted side down the stream? *A.* Something like that.

Q. 38. And between the barge and the light? *A.* Yes, sir.

Q. 39. And then after she went around under the stern of the barge what did she do? *A.* I don't know exactly. I wasn't looking at her at the time. She went off somewhere; tried to go around her and come back to Providence, I believe.

Q. 40. You went to hauling in the hawser after that? *A.* Yes, sir.

Cross Examination by Mr. CARVER.

×-*Q.* 41. Where were you on the tugboat? *A.* What time?

×-*Q.* 42. At the time before the Berkshire came up to you. *A.* Standing on the starboard side, amidship.

×-*Q.* 43. How many other men were on deck? *A.* I don't know. There was one standing side of me.

×-*Q.* 44. Was there anybody standing forward? *A.* Well, I wasn't looking at the time who was around. I wasn't paying any attention to the people on deck. There was one standing side of me.

DEPOSITION OF MOSE BLAIR.

Direct Examination by Mr. ROELKER.

Q. 1. Mr. Blair, you were fireman aboard of this tug when the accident occurred? *A.* Yes, sir.

Q. 2. Where were you? *A.* I was down in the fire room.

Q. 3. Do you know anything about the hawser being shortened that day? *A.* Yes, sir.

Q. 4. Where were you then? *A.* Well, when we were stopped I looked out of the fire room door, and saw them shortening the hawser up.

Q. 5. Did you see them taking it on board the tug, — any of it? *A.* No, sir; I wasn't there then.

Q. 6. You know they shortened it up? *A.* Yes, sir.

Q. 7. When they got it shortened, how much hawser was there out, if you know? *A.* Well, I reckon there was about twice the length of the tug, or twice the length of the barge.

Q. 8. How did it compare with the length of the hawser that you usually use in going in and out of harbors? *A.* I should judge it was about the same length as usual.

Q. 9. Then you were down in the fire room from that time on? *A.* Yes, sir.

Q. 10. Did you get any orders down there? *A.* Yes, sir.

Q. 11. What? *A.* I got two bells for putting the draught doors in.

Q. 12. How long was that before the tug stopped? *A.* I reckon that was about four or five minutes; I couldn't say.

Q. 13. Before the tug stopped? *A.* Yes, sir.

Q. 14. And then she stopped altogether? *A.* Yes, sir.

Q. 15. You stopped then and went on deck? *A.* No, sir. He rang four bells for me to go back in the engine room.

Q. 16. What did you do then? *A.* He told me to open my connection doors, and then I saw that the engine was stopped.

Q. 17. When you opened your connection doors? *A.* Yes, sir.

Q. 18. What did you do then? *A.* I came on deck.

Q. 19. What did you see when you got on deck? *A.* Well, the collision was done when I got on deck.

Q. 20. Where was the steamer Berkshire then with reference to the barge? *A.* She was right into the barge then.

Q. 21. Right into her? *A.* Yes; she was into the barge and working out.

Q. 22. Which way was she working out? *A.* That I don't know. I didn't pay no attention to that.

Q. 23. Did you see the lighthouse there? *A.* Yes.

Q. 24. Was she working out towards the lighthouse on that side? *A.* Yes, sir; she was working on that side.

Q. 25. Was she backing out, or what was she doing? *A.* I couldn't say if she was backing out or what.

Q. 26. After she got clear of the barge, did you see what she did? *A.* No, sir; I don't remember.

Q. 27. You remember that she worked out on that side towards the lighthouse? *A.* Yes, sir.

Q. 28. And that is all you remember about it? *A.* Yes, sir.

Q. 29. Did you hear any whistle from your tug that day? *A.* Yes, sir.

Q. 30. What whistles were they? *A.* There was one blast.

Q. 31. Only one blast? *A.* Yes, sir.

Q. 32. You could tell it was from your own tug? *A.* Yes, sir.

Q. 33. How long was that before the collision, if you can remember? *A.* Well, I couldn't tell you exactly how long it was before the collision.

Q. 34. It was some time before the collision? *A.* Yes, sir; it was.

[*Cross examination waived.*]

DEPOSITION OF JOSEPH ARDITA.

Direct Examination by Mr. Roelker.

Q. 1. Joseph, you were on the tug when the accident happened? *A.* Yes.

Q. 2. Do you remember anything being done to the hawser that day? You pulled it in on board of the barge? *A.* Yes.

Q. 3. Was it shortened? *A.* Yes.

Q. 4. How long was it when you got through shortening? *A.* Well, I think as long as going in the harbor of New York or Providence or Boston.

Q. 5. About how long compared to the tugboat? *A.* I think along like the barge.

Q. 6. About as long as the barge? *A.* Yes; like that, I believe.

Q. 7. Did you hear any whistle that day from the tug? *A.* Oh, yes.

Q. 8. What whistle did you hear? *A.* A long one.

Q. 9. One whistle? *A.* Yes, a long.

Q. 10. Did you look to see where you were then? *A.* Yes. I see the Berkshire coming.

Q. 11. How far off was the Berkshire when you gave the whistle? *A.* A half a mile.

Q. 12. On which side of the channel was she? *A.* She was coming this way.

Q. 13. Did the Berkshire answer the whistle? *A.* No, sir.

Q. 14. After that what were you doing? *A.* I wasn't doing nothing. I was looking forward; that is all.

Q. 15. Were you at work at anything? *A.* Yes, sir; I was shining brasses.

Q. 16. What was the next you saw of the Berkshire? *A.* Nothing at all; saw her pass. When the tug stopped I saw her pass.

Q. 17. Which side of you did she pass? *A.* It was the upper side.

Q. 18. On the righthand side? *A.* Yes.

Q. 19. How close to you did she pass? *A.* I don't know. I think thirty-five or forty feet; like that, I think.

Q. 20. Did you see her strike the barge? *A.* No, sir.

Q. 21. After she struck the barge did you see her backing out? *A.* I saw them hollo on the tug that she would sink, and I see the stern of the barge. The bow had gone down.

Q. 22. Did you see the Berkshire then? *A.* No; I didn't notice her.

Cross Examination by Mr. CARVER.

×-*Q.* 23. You were shining brass? *A.* Yes, sir.

×-*Q.* 24. What part of the vessel? *A.* The starboard side of the vessel.

×-*Q.* 25. Astern? *A.* No; in the middle of the ship. I see the Berkshire coming forward.

DEPOSITION OF MARK W. SCHOFIELD.

Direct Examination by Mr. ROELKER.

PROVIDENCE, June 5, 1894.

Q. 1. Please state your name, age and residence. *A.* Mark W. Schofield; civil engineer and land surveyor; Providence.

Q. 2. Have you made a plan of the waters of Narragansett Bay adjoining Sabin's Point lighthouse for me? *A.* Yes, sir.

Q. 3. Is that it? *A.* Yes.

[*Plan produced and marked* "M. W. S., Exhibit 1."]

Q. 4. Please state how you made that plan? *A.* I enlarged it from the Government chart.

Q. 5. Will you please examine this chart and see if it is the one you used in making this enlarged plan? *A.* Yes.

Q. 6. Have you enlarged this correctly to a scale? *A.* Yes, sir.

Q. 7. And marked the scale on it? *A.* Yes, sir. Scale four hundred feet to an inch.

Q. 8. That is the correct scale as shown on this enlarged plan, M. W. S. No. 1? *A.* Yes, sir.

Q. 9. Will you please examine this plan and state whether you have marked in red ink the figure of a barge, and printed beside it the words "Sunken barge", and state whether that is the correct location of the barge as found by you at the bottom of the Providence River? *A.* Yes, sir.

Q. 10. When did you do that? *A.* I did that Aug. 23 and 25, 1893.

Q. 11. I notice also a number of figures in red ink marked in the vicinity of Sabin's Point Light, and to the north and westward across the channel from the light. Will you please state what these figures denote? *A.* These figures denote the depths below mean low water.

Q. 12. In feet? *A.* In feet.

Q. 13. At what points? *A.* At the points indicated, where the figures are.

Q. 14. How did you arrive at the depths at the points where the figures are marked? *A.* I located them by having an assistant at this beacon below Pawtuxet with an instrument, taking the ranges; he kept a record of the time he took them. I was in a boat and took the ranges from where I was to points on the shore, and I kept a record of the time myself.

Q. 15. Did you make actual soundings yourself at these points? *A.* Yes, sir; took them myself.

Q. 16. And subsequently marked them on this plan? *A.* Yes, sir.

Q. 17. As the result obtained by triangulation and soundings, as you have stated? *A.* Yes, sir.

Q. 18. And these are the correct measurements at low-water mark? *A.* Yes, sir.

Q. 19. At these points in the river? *A*. Yes, sir.

Q. 20. Now, I observe that you have marked, for instance, on the west side of the channel, about due west from Sabin's Point Light, the figure 19 1-2, and about due north from that another figure 27, is it? *A*. Yes, sir.

Q. 21. I will ask whether you made any soundings between these points. *A*. Yes, sir; when I went from one point to the other I dragged the sounding iron along, and found no elevation.

Q. 22. You found no elevation between the points 22 and 27? *A*. No, sir.

Q. 23. And that would be equally true all along there? *A*. Yes, sir.

Q. 24. No elevations along there? *A*. None that I could discover.

Q. 25. These figures in black are copied from the chart inside the channel lines? *A*. Yes, sir; they denote the depth in fathoms.

Cross Examination by Mr. CARVER.

×-*Q*. 26. These figures outside the dotted lines are taken from the chart and designate the depth in feet, are they not? *A*. Yes, sir.

×-*Q*. 27. That 10 there on the west side between the figures, the two figures 22 in red, designate feet? *A*. Yes, sir; they designate feet.

DEPOSITION OF BYRON E. CHENEY.

Direct Examination by Mr. ROELKER.

Q. 1. You reside at Pleasant Bluffs, in the town of East Providence, and keep a hotel there? *A*. Yes, sir.

Q. 2. You witnessed the accident between the Berkshire and the barge last summer? *A*. Yes, sir.

Q. 3. Where were you, please? *A*. I was standing on the shore.

Q. 4. Anywhere near your hotel? *A*. At the south end of my hotel.

Q. 5. Can you show me on this map about where your hotel is? *A*. It is *here*, a little southwest of Sabin's Point.

[*Marked* "Cheney", *with a cross.*]

Q. 6. You were there? *A*. Yes, sir.

Q. 7. What first called your attention to the vessels in the stream? *A*. Well, I heard the noise, the crash.

Q. 8. When they came together? *A*. Yes; when they came together.

Q. 9. Will you state about where the barge was from where you stood? *A*. I should say that from where I stood the stern of the barge was just about north of the lighthouse; just a little north of Sabin's Point light.

Q. 10. And where was the tug, how far off? *A*. I should say between three hundred and four hundred feet; it might have been five hundred, might have been less.

Q. 11. You could not tell? *A*. Couldn't hardly tell.

Q. 12. She was to the northward somewhat? *A*. Yes.

Q. 13. How did the steamer strike the barge, if you saw? *A*. On the bow.

Q. 14. After the collision was over, which way did the steamer float off? *A*. They both floated down stream together.

Q. 15. Both went down stream together? *A*. Yes, sir.

Q. 16. Was the steamer between you and the barge? *A*. I think it was.

Q. 17. How far down did the steamer float before she started up stream again? *A*. They both floated down stream together until the barge was a little below the lighthouse. The steamer backed up and steamed down the river; went down on the east side of the barge and came up on the west side.

Q. 18. Did you notice anything about any whistles that day? *A*. No. I didn't hear any whistles.

Q. 19. Are you in the habit of noticing the whistles there? [*Objected to by* MR. CARVER.] *A*. There might have been a whistle and I not hear it, not notice it. The boats are whistling going up and down there all the time.

Cross Examination by MR. CARVER.

×-*Q*. 20. You heard the crash before you noticed either the barge or the steamer? *A*. That is what first called my attention.

×-*Q*. 21. So that when you first saw them they were together? *A*. They were together.

×-*Q*. 22. That crash was the breaking of wood, apparently? *A*. I should say yes.

×-*Q*. 23. Did you notice how they were together when you saw them? *A*. It looked to me as though both bows were together.

DEPOSITION OF JOHN VERY.

Direct Examination by Mr. Roelker.

Q. 1. What is your business, Mr. Very? *A*. Boat builder.

Q. 2. You live in Riverside? *A*. Yes, sir.

Q. 3. Did you notice the collision between the two boats last summer, — the barge and the steamer Berkshire? *A*. What I noticed first was the tug and the barge coming up the river. Next thing I heard was the tug blowing a long blast.

Q. 4. Where was the tug at this time? *A*. She was just opposite the stake that the Continental boats round in coming up to the wharf.

Q. 5. Can you show us where this stake is on this plan? *A*. Here. It was south of it about two hundred yards.

Q. 6. Six hundred feet; that would be an inch and a half; an inch and a half south. That would bring us about there, where I have marked the cross.

[*Marked with a cross and a* "V."]

Q. 7. Where were you at this time? *A*. Right on the shore opposite this.

Q. 8. Right in shore, about eastward from the light? *A*. Yes.

Q. 9. And the first you saw was the tug and the tow coming up? *A*. Yes, sir.

Q. 10. And the tug blew a long blast, you say? *A*. Yes, sir.

Q. 11. Did you look out then to see what was in the river? *A*. I did.

Q. 12. Where did you see the Berkshire? *A*. Not at all. The view up the river at this point is cut off by a shed.

Q. 13. Did you hear any answer to this blast of the tug from the Berkshire or anybody else? *A*. No, sir; I did not.

Q. 14. How long was the hawser, to the best of your judgment, between the tow and the barge? *A.* From where I was I should judge that the hawser was three hundred and fifty feet.

Q. 15. Three hundred and fifty feet, you should think? *A.* Yes, sir; of course I could not tell very well because I was not exactly on a straight line. After she got up to the lighthouse she was more at an angle.

Q. 16. Did you hear the crash? *A.* Yes, sir; I did.

Q. 17. When the crash came whereabouts was the barge? *A.* She was about abreast of the light. Perhaps if I had been in a straight line she would have seemed north of the light.

Q. 18. You were a little to the southward, and she looked to you to be about abreast of the light, and you think she was a little to the northward? *A.* Yes, sir.

Q. 19. On which side of the channel was she? *A.* On the west side of the light.

Q. 20. Which side of the channel? *A.* I should judge about the middle of the channel.

Q. 21. Did you see the Berkshire when she struck her? *A.* Yes, sir.

Q. 22. Where did she strike her? *A.* Right in the bows.

Q. 23. After she struck her which way did the Berkshire go? *A.* Backed her over to the west side of the channel. She came down on this side and up on the west side; came round her stern and went up on the west side.

Q. 24. Did you notice where the tug was? *A.* She was up nearly to the black buoy.

Q. 25. To the black or the red buoy? *A.* To the red buoy, I should say. Just about abreast of it or a little above it.

Q. 26. Do you know how wide the channel is there? *A.* You might say it is all channel right up to the boathouse. There is deep water runs in there about a quarter of a mile. Just above the lighthouse, till you get abreast of the boathouse, a quarter of a mile wide.

Q. 27. What boathouse are you speaking of? *A.* The Pawtuxet. There is water all the way up as much as a quarter of a mile wide.

Q. 28. Can you show us on this plan about where the Pawtuxet boathouse is? *A.* I should think it was off in here somewhere.

Q. 29. You cannot locate it exactly? *A.* I don't know as I can on that map.

Cross Examination by Mr. CARVER.

×-*Q.* 30. You say that it was hard work for you to judge the length of the hawser, because you did not see them directly abreast of you, but saw them at an obtuse angle? *A.* Yes, sir.

×-*Q.* 31. And you were about half a mile away? *A.* Yes; I should call it half a mile.

×-*Q.* 32. And the tug and the barge at that distance from you appeared to be about three hundred and fifty feet apart? *A.* I don't understand the question.

×-*Q.* 33. Will the stenographer please read the question? [*Question read.*] *A.* Yes, sir.

×-*Q.* 34. How far from you do you think the Berkshire was when you first noticed her? *A.* I could not say that.

×-*Q.* 35. Can't you give us some judgment? *A.* Well, after she struck, I took my skiff and went off there, after they came together.

×-*Q.* 36. But I mean before that; when you first saw her, before they came together. *A.* When I first saw the tug?

×-*Q.* 37. When you first saw the Berkshire. *A.* She was just about abreast of the red buoy, north of the light.

×-*Q.* 38. You didn't look up the river before that? *A.* There were two Pawtuxet boats going up the river. From where I was I could not see the Berkshire so quick as I might if I had been a little further down the shore.

×-*Q.* 39. Did you see the vessels when they came together? *A.* Yes, sir.

×-*Q.* 40. Could you see the water round them? *A.* Yes, sir.

×-*Q.* 41. Could you see from the water that the Berkshire was going astern at that time, just as she struck? *A.* No, sir; she didn't go backwards at all; she went ahead.

×-*Q.* 42. Could you see by the water that there had been any reversal of the engines? *A.* No, sir; I could not see that from the shore.

×-*Q.* 43. You could not see from where you were how the vessels were heading? *A.* Don't know as I could exactly, from the shore.

×-*Q.* 44. What were you doing when you first saw them? *A.* I was on the shore painting the bottom of my boat with a coat of paint.

×-*Q.* 45. What was the first intimation you had of the collision? *A.* What made me look up was, I expected a fellow up with a boat for me to fix, and I happened to look up to see if he was coming, and saw nothing but this barge and tug, and I heard her blowing a whistle; then I looked up to see what she was blowing for — looked up the river and saw the Berkshire.

×-*Q.* 46. You didn't see the steam coming out of her whistle, did you? *A.* Oh, yes; I saw the steam coming out.

×-*Q.* 47. How many times did she blow? *A.* She blew one long blast.

×-*Q.* 48. Sure it was a long blast? *A.* Yes.

×-*Q.* 49. Sure it was not a short blast? *A.* It sounded to me like a long blast, unless it was the echo.

×-*Q.* 50. You didn't hear any signal from any other steamer? *A.* No.

×-*Q.* 51. Saw no steam escaping from the Berkshire's whistle? *A.* No.

×-*Q.* 52. At the time you heard this blast had you seen the Berkshire? *A.* No; she hadn't come down in my sight.

×-*Q.* 53. Were there any other steamers you could see? *A.* Two Pawtuxet steamers coming up.

×-*Q.* 54. Are you sure they were coming up, or were they going down? *A.* Coming up; I am positive of it.

×-*Q.* 55. How near were they to the barge and tug? *A.* I don't know as I could say exactly, they were such a great distance off. Perhaps the Planet was three times the length of the barge behind her; the Pioneer was closer.

×-*Q.* 56. In other words, the steamers were in the act of passing the barge? *A.* They passed on the west side.

×-*Q.* 57. Had they passed at the time you heard this whistle? *A.* One of them had, I think, the Pioneer; the Planet did not pass till after they struck.

×-*Q*. 58. The other one, at the time you heard the whistle from the tugboat, had she got past the barge and the tug? *A*. I don't think she had.

×-*Q*. 59. On which side of the barge and the tug did this steamer, the first steamer, pass? *A*. Went to the west side, both of them.

×-*Q*. 60. And they were both going north, I suppose? *A*. Yes, sir.

×-*Q*. 61. And you heard no whistle from them at all? *A*. No.

×-*Q*. 62. Did you hear any whistle before the tug's? *A*. No, sir.

×-*Q*. 63. Heard no other whistle but the whistle from the tug? *A*. No, sir.

×-*Q*. 64. And you say that was a long blast? *A*. Yes, sir.

×-*Q*. 65. How were the tug and the barge with reference to the channel at that time? *A*. I don't know as I noticed that particularly.

×-*Q*. 66. Don't know that you noticed. Could you tell whether the barge was behind the tug, or whether they were moving in the arc of a circle? *A*. Certainly; the barge was behind the tug.

×-*Q*. 67. How fast were they going? *A*. I didn't take any particular notice; common speed up and down the river, I suppose; I don't think she was going out of her speed.

×-*Q*. 68. They were going up in the regular way? *A*. I should judge so.

×-*Q*. 69. How fast do you think that would be? How many knots an hour? *A*. I could not say.

×-*Q*. 70. Six knots? *A*. Could not say.

×-*Q*. 71. Could not give an estimate? *A*. Not on the speed of them.

×-*Q*. 72. You are not a seaman? *A*. Not exactly; I work on the water when I can't get anything to do on the shore. I have a boat of my own that I keep for fishing purposes.

Direct Examination resumed by Mr. Roelker.

Q. 73. There is a large oyster house on the shore that shut off your view to the northward somewhat, isn't there? *A*. Yes, sir.

DEPOSITION OF CHARLES SIMMONS.

Direct Examination by Mr. Roelker.

Q. 1. Where do you live, and what is your business? *A*. I live in Riverside; Pleasant Bluff; am an oysterman, fisherman.

Q. 2. You saw the collision between the Berkshire and the barge last summer? *A*. Yes, sir.

Q. 3. Where were you? *A*. I was standing on the shore near Pleasant Bluff Hotel.

Q. 4. At Mr. Cheney's hotel? *A*. Yes; at Cook's fence on the bank.

Q. 5. That is near Sabin's Point? *A*. Yes, sir.

Q. 6. A little to the southward of it? *A*. Yes, sir. I was on the east side of Sabin's Point, on the shore.

Q. 7. What were you doing? *A*. I had been fixing some eel traps.

Q. 8. Did you hear the tug whistle? *A*. No, sir; I didn't.

Q. 9. Didn't hear her whistle? *A*. Didn't hear no whistle.

Q. 10. What was the first you noticed? *A*. The first — I noticed so many boats coming down together, and stood there and watched them. I saw the Berkshire coming down, and thought that was pretty close. Then I heard the collision, and stood there and watched till she sank.

Q. 11. Did you see the Berkshire as she passed the tug? *A*. Yes, sir.

Q. 12. On which side did she pass? *A*. On the east side, it looked to me.

Q. 13. And whereabouts was the barge when she struck? *A*. She was just clearing the lighthouse, just where I could see through the opening.

Q. 14. She was just north of the lighthouse; and where was the tug? *A*. The tug was ahead of her, just about up to the red buoy up the river.

Q. 15. What part of the channel were they in, should you say? *A*. They were on the east side.

Q. 16. Do you know how wide the channel is there? *A*. It is pretty wide, the channel is.

Q. 17. How wide? *A*. A thousand feet, I should say; as much as that.

Q. 18. Are you familiar with the river there? *A*. Yes, sir; I have been there for twenty years; that is, about Sabin's Point Light.

Q. 19. After the collision which side of the barge did the tug go? *A*. Which side of the barge did the tug go?

Q. 20. I mean the Berkshire. *A*. It looked to me as if it came on the east side of the tug. And when she struck the barge, she came on the east side of the barge and went below the light; then drifted off towards Block Island and came up on the west side; the barge had sunk in the meantime.

Q. 21. Did the barge move any after she was struck? *A*. Yes, sir; I should think she went over her length; it was a very strong tide; the tide was about half down.

Q. 22. Did you notice whether the Berkshire changed her course any, before the collision? *A*. Didn't notice.

Q. 23. How long was the barge in sinking? *A*. Ten or fifteen minutes.

Q. 24. How long should you say the hawser was? *A*. Between two hundred and three hundred, or two hundred and fifty feet; somewhere along there.

Q. 25. That would be your best judgment? *A*. Yes, sir.

Cross Examination by Mr. CARVER.

×-*Q*. 26. How far off were you from the barge at the time of the collision? *A*. Half a mile; they call it a mile across the river, and I was about half way.

×-*Q*. 27. You say you didn't notice any change in the course of the Berkshire? *A*. No, sir.

×-*Q*. 28. Did you watch to see whether there was any? *A*. I watched before the collision. It looked kind of funny to me that the Berkshire should come in there towards the lighthouse.

×-*Q*. 29. Did you notice any change in course on the part of the barge or the tug? *A*. No, sir.

×-*Q*. 30. None of the vessels? *A*. No, sir.

×-*Q.* 31. As far as you could judge from looking at them sideways, they both were just as they were when you first saw them? *A.* Yes, sir.

×-*Q.* 32. It would be pretty hard work for you to notice any change of course? *A.* Yes, sir.

×-*Q.* 33. Pretty difficult? You were looking at them side to? *A.* Yes, sir.

×-*Q.* 34. You would not be apt to notice any change unless it was made at right angles? *A.* No, sir.

×-*Q.* 35. You were not watching these boats all the time? *A.* No, sir.

×-*Q.* 36. After the collision you looked? *A.* Yes.

×-*Q.* 37. It was not till the moment of the collision that your attention was specially called to these vessels, was it? *A.* No, sir.

×-*Q.* 38. You saw lots of steamers going up and down the river? *A.* Yes, sir; there were lots going up and down then.

×-*Q.* 39. You don't remember of any whistles? *A.* No, sir; no whistle.

×-*Q.* 40. But they might have whistles just the same? *A.* Oh, yes, and I not notice it.

×-*Q.* 41. What were you doing? *A.* Nothing at the time; but just before that I was fixing eel pots.

Direct Examination resumed by Mr. Roelker.

Q. 42. You said you thought it kind of funny that the Berkshire should try to get in shore or inside of the tug and the tow. Was there plenty of room for her to go to the westward? *A.* Oh, yes; plenty of room. All the room was to the westward.

Cross Examination resumed by Mr. Carver.

×-*Q.* 43. How did the barge appear to be? *A.* In the middle of the channel. Of course I was looking from the light, and all I could tell was by the Berkshire going so close to the buoy.

×-*Q.* 44. On which side? *A.* She came on the east side.

×-*Q.* 45. And west of the buoy? *A.* Yes.

×-*Q.* 46. She struck just as she was clearing the light? *A.* The barge had just cleared the light.

×-*Q*. 47. Did you notice whether the barge was right behind the tug or not? *A*. She was astern of the tug, of course.

×-*Q*. 48. Isn't it a fact that they were rounding the Point, and instead of being directly ahead, the tug was at an angle? *A*. No; couldn't say.

×-*Q*. 49. You couldn't say anything about that; you don't remember? *A*. No, sir; not at all.

DEPOSITION OF THOMAS DONNELLY.

Direct Examination by MR. ROELKER.

Q. 1. You were at Cheney's Hotel last summer? *A*. Yes, sir.

Q. 2. Did you see the collision between the Berkshire and the barge? *A*. Yes, sir.

Q. 3. Where were you? *A*. I was right in the empty lot, between Mr. Cheney's and Mr. Cook's house.

Q. 4. Just south of Sabin's Point? *A*. Yes, it would be south of Sabin's Point.

Q. 5. What first called your attention to it? *A*. The whistle from the tugboat.

Q. 6. Where was the tug when you heard the whistle? *A*. About one hundred and fifty yards below the red buoy — below the lighthouse, I should say.

Q. 7. Then the tug, when she blew the whistle, was to the south of the lighthouse? *A*. Yes, sir; that is, if you call down the river south.

Q. 8. How many times did she whistle? *A*. Twice; I think it was twice.

Q. 9. Are you sure? A. I think it was twice. Probably the first time I didn't pay any attention; I was out there in that empty lot playing with a couple of dogs.

Q. 10. You don't know sure? You think it was twice? *A*. I know it was twice.

Q. 11. You don't know that both were from her? *A*. One was.

Q. 12. Could there have been more than two? *A*. No, sir.

Q. 13. Did you see the Berkshire strike the barge? *A*. Yes.

Q. 14. Where was the barge then? *A.* I should say the stern was just about even with the lighthouse.

Q. 15. Where did the Berkshire strike her? *A.* I should say it would be on the east side of the river.

Q. 16. The side towards you? *A.* Yes, the side towards me.

Q. 17. How near the bow? *A.* About ten to twelve feet from the buoy.

Q. 18. After they struck, where did the steamer go? *A.* Went to the eastward; swung round and came up on the other side, and went up the river again.

Q. 19. Did the barge sink where she was struck? *A.* She drifted back probably the length of herself.

Q. 20. That is about all you know about it? *A.* That is about all. I went out one day in a boat to see them raising her.

Cross Examination by MR. CARVER.

×-*Q.* 21. You say you heard two whistles? *A.* Yes, sir.

×-*Q.* 22. Did you hear two whistles more than once? *A.* No, sir.

×-*Q.* 23. What did you notice after you heard the two whistles? *A.* I didn't notice again till I heard the crash.

×-*Q.* 24. Did you hear any whistles answering those two whistles? *A.* No, sir; I did not.

×-*Q.* 25. You are sure that you heard two distinct whistles? *A.* Yes, sir.

×-*Q.* 26. One right after the other? *A.* Yes, sir.

×-*Q.* 27. Have you ever been to sea? *A.* No, sir; I have not.

×-*Q.* 28. Did you know what those two whistles meant? *A.* No, sir; I did not.

×-*Q.* 29. Did you hear any whistles from the Berkshire at all? *A.* No, sir.

×-*Q.* 30. Did you look up when you heard those whistles? *A.* Yes.

×-*Q.* 31. Could you see both the barge and the towboat? *A.* Yes.

×-*Q.* 32. Could you see the Berkshire? *A.* Yes, sir,

×-*Q*. 33. How far off did the tug appear to be from the Berkshire at that time? *A*. The tug was a little below the lighthouse, and the Berkshire was quite a distance above.

×-*Q*. 34. How far? *A*. About three hundred yards, I should think.

×-*Q*. 35. How far apart did they appear to be? *A*. About three hundred or three hundred and fifty feet.

×-*Q*. 36. In other words, you think the tug was about three times as far from the Berkshire as the barge was from the tug? *A*. I could not tell very well; I have never been out there but once in my life. The channel I don't know anything about.

×-*Q*. 37. Did you see the vessels when they came together? *A*. Yes, sir.

×-*Q*. 38. Did you see any white water round the tug or the Berkshire? *A*. No, sir.

×-*Q*. 39. You didn't notice how they struck? *A*. They were both bow on to one another.

×-*Q*. 40. Did you notice where the tug was? *A*. I should say the tug was up about even with that red buoy above the light.

×-*Q*. 41. How was the tug with reference to the Berkshire when they struck? *A*. The tug, I should say, would be to the westward of her.

×-*Q*. 42. Did you notice how she bore from her at all? *A*. No, sir; I did not.

DEPOSITION OF THOMAS SMITH.

Direct Examination by Mr. Boelker.

Q. 1. What is your business? *A*. Oysterman.

Q. 2. Did you see this accident between the barge and the Berkshire last summer? *A*. Yes, sir.

Q. 3. Where were you? *A*. Right opposite the stake where the tug blew. I was in the boat with Mike McLaughlin.

Q. 4. You were in the boat with Mike McLaughlin right opposite where the tug blew? *A*. Yes, sir.

Q. 5. Where is that stake? *A*. I could not tell you exactly how many feet from the lighthouse.

Q. 6. In which direction? *A*. Down towards Bullock's Point.

Q. 7. To the southward? *A*. Yes, sir; guess it is.

Q. 8. How many times did she blow? *A*. She blew once.

Q. 9. One blast? *A*. Yes, sir.

Q. 10. How far were you from her when she blew? *A*. I should judge about a hundred yards.

Q. 11. Did you see the Berkshire at that time? *A*. Yes, sir.

Q. 12. Where was she? *A*. Just about the black buoy.

Q. 13. Up the river? *A*. Up the river, coming down.

Q. 14. Had she passed the Bay Queen at that time? *A*. Yes, sir; just passed the Queen, between the black buoy and the red buoy.

Q. 15. Did the Berkshire answer the blast? *A*. No, sir.

Q. 16. Had you noticed at that time the barge coming along behind the tug? *A*. Yes, sir.

Q. 17. How long was the hawser? *A*. I should judge about three hundred or three hundred ten feet, somewhere along there.

Q. 18. What part of the channel were they in? *A*. To the eastward of the lighthouse.

Q. 19. To the eastward of the lighthouse? That is, towards the light? *A*. As near to the light as they could.

Q. 20. They were on the easterly side of the channel? *A*. Yes, sir.

Q. 21. Do you know what the width of the channel is there? *A*. No, sir; I do not.

Q. 22. What was the next that you noticed? *A*. We were dredging for five-fingers, and had just taken in a haul; and we heard the crash and turned round and the two had come together.

Q. 23. Where did the barge seem to be then? *A*. Just about on the point of the lighthouse.

Q. 24. Seemed to be, from where you were, on an angle with the light? *A*. Yes, sir.

Q. 25. And you were to the southward of the light? *A*. Yes, sir.

Q. 26. Where was the tug? *A*. Between the lighthouse and the red buoy, about half ways; pretty close up.

Q. 27. Which side of the Berkshire was she? *A*. On the west side. She was going up, but when she struck she was on the off shore side.

Q. 28. On the west side? *A.* On the west side, yes.

Q. 29. What did the Berkshire do? *A.* She pulled out and backed down, and went right round the stern of the barge and went up the river.

Q. 30. On which side? *A.* On the east side. She floated down a little ways and went up on the other side.

Q. 31. How did she back out? *A.* She backed out square. She struck the barge this way and drew back that way, and started down the river with her stern towards the lighthouse until she got clear of the barge, and then she floated down the river and went up on the other side.

Q. 32. Do you know whether the barge sank where she was struck? *A.* I think she floated down the river a little bit.

Q. 33. About how far? *A.* I could not tell, because she was about two hundred yards away from the light, or something like that.

Q. 34. How was the tide running that day? *A.* Could not tell you.

Q. 35. Did you hear any whistles pass between the Bay Queen and the Berkshire up the river? *A.* No, sir.

Q. 36. On which side of the barge did she pass? *A.* I don't know; I didn't pass any remarks to that at all.

Cross Examination by Mr. Carver.

×-*Q.* 37. You say you heard no whistles from the Berkshire? *A.* Yes, sir.

×-*Q.* 38. What were you doing when you heard this whistle from the tug? *A.* What was I doing? I was five-fingering.

×-*Q.* 39. Were you leaning over? *A.* Yes, sir.

×-*Q.* 40. Did you see the steam from the funnel? *A.* Yes, sir.

×-*Q.* 41. What blast did you hear, one or two? *A.* One blast.

×-*Q.* 42. What was it, a long blast or a short one? *A.* Well, an ordinary blast, such as a tug would generally give.

×-*Q*. 43. And after you heard that blast did you keep on with your fishing? *A*. Yes, kept on till we heard the crash.

×-*Q*. 44. You did not see them, then, until the collision? *A*. Not until we heard the crash.

Q. 45. Did you notice the tug and the tow before the whistles? *A*. Yes, we noticed it away down the river.

×-*Q*. 46. On which side of the river were they? *A*. It would be pretty hard to tell. We didn't take much notice of them; just looked at them and saw them there.

×-*Q*. 47. On which side of the river were they when they got up close to you? *A*. On the east side, towards the light.

×-*Q*. 48. Did you notice whether the tug was directly ahead of the barge, or whether they were swinging round the Point? *A*. It was directly ahead; the barge was just on the turn of the light.

×-*Q*. 49. In other words, they had just commenced to turn round the light? *A*. Just commenced to turn round the light.

×-*Q*. 50. Do you think the barge was turning? *A*. I think she was turned.

×-*Q*. 51. Did you notice them at all just before the accident? *A*. No.

×-*Q*. 52. When the whistles were blown you just looked up and saw them? *A*. Yes.

×-*Q*. 53. Did you see the Berkshire at that time? *A*. Yes.

×-*Q*. 54. Did you see the Bay Queen? *A*. Yes; and there were two other little boats.

×-*Q*. 55. Were they going up the river? *A*. Coming down.

×-*Q*. 56. Were they ahead or astern of the Berkshire? *A*. They were away ahead of the Berkshire, — behind the Berkshire, rather, coming down the river.

×-*Q*. 57. Did you hear any whistles from them? *A*. I don't remember.

×-*Q*. 58. Did you hear any whistles from the Bay Queen? *A*. Think I did.

×-*Q*. 59. How many whistles was that? *A*. I am not sure. I think they blasted once; I am sure she did. I heard two short blasts; I don't know whether it was from the tug or what it was from. I am most positive it was from the tug.

×-*Q*. 60. You are positive that it was from the tug? *A*. Yes; that it was two short blasts from the tug.

Direct Examination resumed by Mr. ROELKER.

Q. 61. You heard two short blasts, but you are not sure whether it was from the tug or who it was from? *A*. It was from the tug.

Q. 62. I understood you to say that the tug blew one blast? *A*. She blew one blast and then she blew two short blasts, either to the Bay Queen or to the two boats coming down.

Q. 63. Was this after the collision occurred? *A*. No, it was not after the collision; it was before the collision at all. The Berkshire was about passing the tugboat at the time she blew.

Q. 64. First you say the tug blew two short blasts, and then you say the Berkshire blew? *A*. No; after she blew one blast to the Berkshire, then she blew two short blasts.

Cross Examination resumed by Mr. CARVER.

×-*Q*. 65. First you heard one blast from the tug? *A*. Yes, sir, to the Berkshire.

×-*Q*. 66. And then you heard two blasts from the tug? *A*. Yes, sir.

×-*Q*. 67. That was after the Berkshire passed? *A*. Yes, sir.

×-*Q*. 68. Then you heard both the one blast and the two short blasts before the collision? *A*. Yes, sir.

×-*Q*. 69. And you didn't look up until after the collision? *A*. Not till after the collision.

DEPOSITION OF MICHAEL McLAUGHLIN.

Direct Examination by Mr. ROELKER.

Q. 1. You are an oysterman, Mr. McLaughlin? *A*. Yes, sir.

Q. 2. And you were in the boat with Mr. Smith when the collision between the Berkshire and the barge, last summer, occurred? *A*. Yes, sir.

Q. 3. How near to the stake where the Continental boats turn? *A*. Pretty close to it.

Q. 4. Did you notice the tug and the tow as they went up? *A.* Yes, sir.

Q. 5. How long was the hawser between the tug and the tow? *A.* I should judge about three hundred feet.

Q. 6. Did you hear anything from the tug? *A.* Yes, sir.

Q. 7. What did you hear? *A.* I heard her blow one long whistle.

Q. 8. You say a long whistle. Generally these towboats do blow a long blast, don't they? *A.* Yes, a good sound blast.

Q. 9. Did she get any answer from anywhere? *A.* No, sir.

Q. 10. Did you look up the stream to see what was coming? *A.* Yes, sir.

Q. 11. What did you see? *A.* Saw the Berkshire come down by the black buoy.

Q. 12. Had she passed the Queen at that time? *A.* I think the Queen was to the east of her at that time.

Q. 13. On which side of the channel was the Berkshire up there at the black buoy? *A.* Could not exactly say. She was coming down the channel.

Q. 14. You couldn't say whether she was in the middle or to the westward or east of the channel? *A.* No, sir.

Q. 15. Did you hear any signals pass between the Berkshire and the Queen? *A.* No, sir.

Q. 16. You say the Berkshire didn't answer this whistle? *A.* No, sir; not to my knowledge, she did not.

Q. 17. What part of the channel were the tug and tow in when they passed you? *A.* They were coming up; I should think they were to the east, if any.

Q. 18. To the eastward of the centre? *A.* Yes, sir.

Q. 19. Now, what was the next thing that you noticed about these vessels? *A.* The next thing I noticed was when I heard the crash.

Q. 20. You were busy dredging for five-fingers then? *A.* Yes, sir.

Q. 21. Didn't notice anything till you heard the crash? *A.* No, sir.

Q. 22. When you looked around what did you see? *A.* Saw the Berkshire stuck in the barge.

Q. 23. Whereabouts was the barge with reference to the Sabin's Point Light? *A.* I guess she was to the west of the light, west of me.

Q. 24. Had she got past the light? *A.* No; she hadn't got past the light.

Q. 25. Whereabouts was the tug? *A.* The tug was up about the red buoy, just on the turn.

Q. 26. Just before the turn? *A.* Yes, sir.

Q. 27. And the Berkshire was which side of the tug? *A.* I don't know which side of the tug she came down; I don't know; I never looked.

Q. 28. I mean at the time when you did look? *A.* After she struck the barge she swung right round towards Pawtuxet Beacon. She came round between the barge and the light, and went round the stern of the barge towards Pawtuxet Beacon.

Q. 29. The tide was running out that day? *A.* Yes, sir.

Q. 30. Was there plenty of water for the Berkshire to pass to the westward of the barge at the time of the accident? *A.* There was plenty of water either side, because after she struck the barge she went to the west.

Q. 31. Which way did she back out? Which way did her stern point? *A.* Who -- the Berkshire?

Q. 32. Yes. *A.* I think she backed all round.

Q. 33. She turned completely round? *A.* I think she did, to the best of my knowledge.

Q. 34. You are familiar with the channel there? *A.* I know how it runs. I don't know the depth of the water. I never sounded it.

Q. 35. You know where the channel is — how wide it is? *A.* There is pretty deep water over next Pawtuxet. There is a man who used to eel along there, and he says it is pretty deep water.

Q. 36. By "pretty deep water", what do you mean? *A.* I won't say how deep it is because I can't tell you.

Q. 37. I will ask you how wide it is, to the best of your judgment? *A.* As long as I don't know there is no use telling what it is or what it ain't.

Q. 38. Have you seen steamers like the Berkshire passing up and down the river? *A.* Passing up and down the river? Oh, yes.

Q. 39. Have you seen them pass to the westward of where this accident occurred? *A.* Well, they might pass to the westward.

Q. 40. Was Mr. Smith in the boat with you that day? *A.* Yes, sir.

Q. 41. About how far out was the tide, if you remember? *A.* I guess it was more than half out.

Q. 42. What did you do after the accident, if anything? *A.* Nothing.

Q. 43. Stayed where you were? *A.* Yes.

Cross Examination by Mr. CARVER.

×-*Q.* 44. How much does the tide rise and fall there? *A.* I guess six or seven feet. Probably sometimes higher, sometimes lower. Spring tides, of course, it rises higher.

×-*Q.* 45. You say that you heard a long whistle from the tug? *A.* Yes, sir.

×-*Q.* 46. And you heard no reply to that whistle? *A.* No, sir.

×-*Q.* 47. And you didn't hear any whistles between the Berkshire and the Queen? *A.* No, sir.

×-*Q.* 48. Didn't you hear the tug blow two whistles before the collision? *A.* No, sir.

×-*Q.* 49. You don't remember of hearing more than one? *A.* No, sir; she blew once.

×-*Q.* 50. You don't remember hearing any more from her? *A.* No, sir.

×-*Q.* 51. Did you hear any other? *A.* No, sir.

×-*Q.* 52. You were busy with your work up to the time of the collision? *A.* Yes, sir.

×-*Q.* 53. You were bending over? *A.* Yes; bending over and sitting down.

×-*Q.* 54. Which way were you facing? *A.* Facing about southeastward. I was in a sailboat, and she was going about southeast.

×-*Q.* 55. Were you at the wheel? *A.* Yes, sir.

×-*Q.* 56. Where was the other man? *A.* He was sitting down, picking five-fingers.

×-*Q*. 57. So that when you saw the Berkshire it was by turning round? *A*. Yes, sir.

×-*Q*. 58. When you heard the crash you looked round? *A*. Yes, sir.

×-*Q*. 59. Didn't you hear any whistles pass? *A*. No, sir.

×-*Q*. 60. If there were any blown you didn't pay any attention? *A*. No.

×-*Q*. 61. What particularly attracted your attention to this blast of the tug? *A*. Because it was a long blast; it was an ordinary blast, I should say.

×-*Q*. 62. All the time until the collision you kept going away from the tug? *A*. I was not going very far away because it was very light wind.

×-*Q*. 63. You were heading down the river all the time? *A*. Yes, sir.

×-*Q*. 64. How far do you think you were from the barge at the time of the collision? *A*. I might have been six hundred or seven hundred feet.

×-*Q*. 65. Was the tug abreast of you when you heard the whistle? *A*. She was a little down the river.

×-*Q*. 66. Were any other vessels between the tug and the Berkshire at the time she blew that whistle? *A*. No; not as I know of

×-*Q*. 67. You can't say positively? *A*. No; I won't say.

×-*Q*. 68. Do you know where the Queen was? *A*. The Queen at the time the towboat blew was abreast of the Berkshire, from where I was; I happened to look up at that time.

×-*Q*. 69. Where was the Planet? *A*. I could not say anything about the other boats.

×-*Q*. 70. But there were other boats around there? *A*. Yes.

×-*Q*. 71. You didn't pay much attention to the other boats till after the collision? *A*. No, sir.

Direct Examination resumed by Mr. ROELKER.

Q. 72. Did you see the steam from the whistle of the tug? *A*. No; but I know that she blew one good whistle. I don't believe there was a man in Providence River as near to the tug as I was that day.

DEPOSITION OF CHARLES H. PENNO.

Direct Examination by Mr. ROELKER.

Q. 1. You were fishing, Mr. Penno, at the time this collision occurred between the Berkshire and the barge? *A.* Yes, sir.

Q. 2. Whereabouts? *A.* In a general direction, south of the old beacon, — Pawtuxet Beacon.

Q. 3. Did you hear any whistle that day? *A.* I did.

Q. 4. What from? *A.* From the tug.

Q. 5. What whistle was it? *A.* One loud full blast.

Q. 6. Where was the tug when she blew? *A.* She was just about abreast of me.

Q. 7. That would be west of you? *A.* I was west of her.

Q. 8. And you were fishing just south of Pawtuxet Beacon when the thing happened? *A.* I was.

Q. 9. Did you notice the tow? *A.* I did.

Q. 10. How long was the tow line? *A.* According to my best judgment, about three hundred feet.

Q. 11. On which side of the channel did she seem to be from you, as far as you can tell? *A.* When she was abreast of me there I didn't notice in particular, but when she got up to the light she was on the east side of the channel, I should say.

Q. 12. Did you notice the collision? *A.* I did.

Q. 13. What first called your attention to it? *A.* The first that my attention was called to was that loud blast of the tug when she was off abreast of me, and I looked up and saw the tow, and then I looked instantly up to the north, in a general direction, to see what she was whistling to, and I saw the Berkshire.

Q. 14. Where was the Berkshire? *A.* She was up about at the black buoy.

Q. 15. Did you notice the Queen there? *A.* No; I didn't notice the other boats at all.

Q. 16. Which side of the channel did the Berkshire seem to be on? Up at the black buoy? *A.* In the middle, or possibly to the west side of the channel.

Q. 17. Did she make any answer to the whistle of the tug? *A.* No answer whatever.

Q. 18. Did you continue to watch them? *A.* I continued to watch them until they had collided and the Berkshire backed off clear; then my attention was attracted by my lines, fishing tackle or something, because I didn't notice afterwards until she got down pretty close to me; then I looked for the barge and she was not to be seen, and I concluded she was sunk.

Q. 19. On which side of the channel was the Berkshire then? *A.* She was in pretty close to me; I remember thinking she would be very near touching.

Q. 20. Which way did she float? *A.* Sideways, if I remember rightly.

Q. 21. You say she backed off; which way did she back? *A.* She backed off to the east.

Q. 22. And then floated down sideways? *A.* I think so,

Q. 23. And then came down south of where the barge was? *A.* Yes, sir; she did.

Q. 24. Did the barge sink where she was struck? *A.* Well, I think she came back a little.

Q. 25. Came back to the southward? *A.* Yes.

Q. 26. Did you notice where she was when she was struck? *A.* I should say she was a little north of abreast of the light, and toward the red buoy; I should say she was east; on the east side of the channel.

Q. 27. And a little to the north of the light? *A.* A little to the north of the light.

Q. 28. Did you notice the Berkshire as she passed the tug? *A.* Yes; the tug was coming up the channel here, and I took it that when the towboat saw that the collision was likely to occur she seemed to swerve off to the westward of the channel, and the Berkshire came down and she seemed to swerve as they got close together over to the westward, and she struck the barge on the starboard side right close to the bow.

Q. 29. You say she seemed to swing over to the westward from the course she had been holding. How close was the Berkshire at the time she made that change? *A.* I should say they were two hundred or three hundred feet apart.

Q. 30. How close did she pass to the tug? *A.* I should think the tug was barely a hundred feet, because she was thrown away out here. Here was the barge and the towboat in a line —

Q. 31. That was before she changed her course? *A*. Yes. They were on the east side of the channel. The tug hadn't quite got up to the red buoy.

Q. 32. About where was the Berkshire when she changed her course? *A*. From my position it was pretty difficult to discriminate.

Q. 33. I am asking you how it appeared to you. *A*. The bow of the Berkshire seemed to suddenly swerve to the westward and throw her into the bow of the barge.

Q. 34. How far off was she from the barge when her bow seemed to swerve? *A*. About two hundred or three hundred feet.

Q. 35. Just about when she passed the tug? *A*. I should think just about then.

Q. 36. As to the speed, did you notice about that? *A*. I should say that the Berkshire, although I was south of that, that the Berkshire had the most speed of the two.

Q. 37. At the time of the collision which had the most headway on? *A*. Well, that would be very hard to discriminate, I think. Of course both had motion; it didn't seem so very great; still, the roar that it made indicated that there was very great force.

Q. 38. You mean the roar of the collision? *A*. Yes, the crash.

Q. 39. The tide was which way? *A*. I should say it was over half out.

Q. 40. How wide is the channel there? *A*. We consider that the red buoy is one line on the east side of the channel, and the other extends over to the beacon — the old Pawtuxet beacon.

Q. 41. That is the generally accepted opinion of the channel there? A. That is what I should say.

Q. 42. You never sounded it yourself? *A*. Never sounded it.

Cross Examination by Mr. CARVER.

×-*Q*. 43. You say that you noticed that the Berkshire's bow seemed to swerve to the west? *A*. Yes.

×-*Q*. 44. And you also say that you thought the bow of the barge swung, which way? *A*. The bow of the barge swung? No; I didn't say the bow of the barge swung.

×-*Q*. 45. Well, didn't it swing? *A*. No, I don't think it did.

×-*Q*. 46. You think the bow of the Berkshire swung to the west? *A*. Swung to the west.

×-*Q*. 47. Did you notice any commotion in the water as though the steamer had reversed her engines at that time? *A*. No; I could see from my position if it had reversed.

×-*Q*. 48. How much do you think the bow of the Berkshire swung? *A*. It would be very hard for me to determine. The Berkshire was coming down, pointing towards me, general direction. I could notice that her bow swung a little in that direction. I was in that position.

×-*Q*. 49. You say that that swing was just before the collision took place? *A*. Just before the collision took place.

×-*Q*. 50. Did she seem to be swinging at the time she struck? *A*. That I could not say, but I noticed as she was approaching, I could see that her bow swung to the westward.

×-*Q*. 51 Where was the tug at the time that you saw the bow of the Berkshire change to the westward? *A*. She was kind of swinging off; that is, I came to the conclusion that the tug thought that a collision was inevitable and she was kind of swinging out of the way.

×-*Q*. 52. Which way? *A*. To the west.

×-*Q*. 53. Then according to your observation, both the Berkshire and the tug were swinging to the west just before the collision took place? *A*. Yes; just before the collision took place. Here was the barge on the east side of the channel, and here was the Berkshie coming down, and the tug concluded that a collision was inevitable and, I should judge, shut down her steam and was veering off here to the west.

×-*Q*. 54. It is a fact, is it not, that the tug was abreast of the Berkshire just before the collision took place? *A*. She would be off abreast, east and west in a general direction, but when the Berkshire struck the barge of course the tugboat was off a little to the west, and the length of her hawser, I should say, to the north.

×-*Q*. 55. In other words, when the collision took place, the tug was on the starboard side of the Berkshire? *A*. When the collision took place the tug would be north of the barge and therefore to the northwest of the Berkshire; that would be the general direction; of course the accurate points of the compass it would be impossible for me to state.

×-*Q.* 56. That would bring the starboard side of the Berkshire abreast of the starboard side of the tug? *A.* Here is the tug off here; on her starboard quarter you would call it.

×-*Q.* 57. Did you notice on which bow of the barge the Berkshire struck? *A.* I did.

×-*Q.* 58. Which one? *A.* I should say it was on the starboard; that is, the right-hand side.

×-*Q.* 59. You think if there had been no change of course made by the Berkshire there would not have been any collision? *A.* That I could not say. I could not say as to their intention or anything of the kind.

×-*Q.* 60. I didn't ask you that. You said you saw a change of course on the part of the Berkshire? *A.* So I did.

×-*Q.* 61. You say when they struck it was nearly head on, but on the starboard side of the barge? *A.* On the starboard side of the barge.

×-*Q.* 62. Knowing these two facts, if the head of the Berkshire had not swung off to the westward there would not have been any collision? *A.* Yes; if the Berkshire had swung enough to the east there would not have been any collision.

×-*Q.* 63. Supposing she had not swung at all, but gone straight, what would have been the result? *A.* Well, I think she would have got clear of her.

×-*Q.* 64. Are you acquainted with steamers at all? *A.* Not professionally; only just from boating down the river.

×-*Q.* 65. Could you tell from the appearance of the Berkshire coming down whether she had slackened her speed at all after you first saw her? *A.* I could not tell from where I was.

×-*Q.* 66. Did you notice any slackening of speed on the part of the tug? *A.* I only know she swung off to the west.

×-*Q.* 67. When the collision took place, the tug and barge were not in a line? *A.* When the boats came in contact the tug was up to the northwest.

×-*Q*. 68. In other words, the tug bore on the barge's port bow? *A*. In other words, she was to the left of the barge, but ahead.

×-*Q*. 69. Certainly ahead, and to the left? *A*. Yes.

×-*Q*. 70. You don't think there was any change of course on the part of the barge up to the time of the collision? *A*. I don't think there was.

×-*Q*. 71. How long do you think it was from the time that the Berkshire and the tug's bows were abreast of each other until the time the collision took place? *A*. That I could not say; it was a short time I know, very short.

×-*Q*. 72. Give us your best judgment. *A*. Well, perhaps a minute or a minute and a half. A minute might cover it.

×-*Q*. 73. What was you doing at that time? *A*. I was sitting in my boat, looking intently at them as they approached each other.

×-*Q*. 74. Was your boat at anchor? *A*. Yes.

×-*Q*. 75. And according to your judgment it was about a minute or a minute and a half from the time the tug and the Berkshire were abreast of each other until the collision? *A*. It might have been shorter or longer. I would not attempt to state exactly. They were both moving and of course it would be a short time. Perhaps I have made it four times as long as it really was.

×-*Q*. 76. Did you hear any whistle between the Berkshire and the Bay Queen? *A*. I didn't take any notice of them whistling. There were a number of boats that met up above. I was busy then and didn't notice.

×-*Q*. 77. Did you notice the Planet? *A*. No, not at all.

×-*Q*. 78. Did you hear the tug blow twice? *A*. No.

×-*Q*. 79. Only hear her blow once? *A*. Yes.

DEPOSITION OF PETER McLAUGHLIN.

Direct Examination by Mr. Roelker.

Q. 1. You are an oysterman, Mr. McLaughlin? *A*. Yes, sir.

Q. 2. And you saw the accident between the Berkshire and barge, last summer? *A*. Yes, sir.

Q. 3. Please state where you were. *A*. A quarter of a mile away from the spot.

Q. 4. Whereabouts? *A.* To the northeast of the accident.

Q. 5. Where on the shore? *A.* I was raking oysters on the bed.

Q. 6. What was the first you saw? *A.* The first I heard was a loud whistle, and that was below the lighthouse.

Q. 7. Did you see what that came from? *A.* It came from the towboat. I looked up and saw the steam escaping from the towboat at the same time as the whistle. I looked up the river, and northwest from where I was I saw the Berkshire coming down, and the Bay Queen going up to the city.

Q. 8. Which side of the Berkshire did the Bay Queen pass? *A.* Passed to the eastward of the Berkshire.

Q. 9. Whereabouts, in relation to the black buoy? *A.* Just in the range of the black buoy, from where I was.

Q. 10. Did you hear any whistles exchanged between them? *A.* I did not.

Q. 11. The first you heard was this whistle from the tug? *A.* Yes.

Q. 12. And the Berkshire and the Bay Queen were just passing each other? *A.* Yes, sir.

Q. 13. And the two little Pawtuxet boats? *A.* They were passing each other. They were all up there together.

Q. 14. The tug was on which side of the channel? *A.* On the east side.

Q. 15. How far below the lighthouse? *A.* Two hundred or two hundred and fifty feet.

Q. 16. Did you watch them come up? *A.* Yes, sir; I did.

Q. 17. What happened then? Just go on and tell us. *A.* Well, the Berkshire came down —

Q. 18. Did she answer this whistle? *A.* Not that I could hear.

Q. 19. Would you be likely to hear it if she did? *A.* I was nearer to the Berkshire than to the towboat, and if she had answered it I should have heard it.

Q. 20. Which side of the channel was the tug on? *A.* The tug was, of course, to the westward of the Berkshire, but to the east side of the channel going up.

Q. 21. She was on the eastward side of the channel? *A.* Yes; but the Berkshire came down to the east of the tug.

Q. 22. I will ask you right there how long was the hawser between the tug and the tow? *A*. I should judge three hundred feet. It might be longer and it might be shorter; it could not be a great deal either way.

Q. 23. When the Berkshire passed the tug, about where was the tug? *A*. Just about in range of the red buoy from where I was.

Q. 24. Which side of the tug did she pass? *A*. To the eastward side of the tug.

Q. 25. And how close to it? *A*. I could not tell you; I could not tell from where I was; I was a quarter of a mile off.

Q. 26. Did you see any change of course on the part of the tug? *A*. No, sir; I could not say that. If she came a little further along she would have to turn and go northeast, going round the Point. If she went one hundred or one hundred and fifty feet further she would have to turn to get round the Point.

Q. 27. After she passed did you notice any swinging on the part of the Berkshire? *A*. She turned to swing down the river after she struck the barge; the stern swung eastward and down the river; her head was to the northwest.

Q. 28. If she had held her course and had not turned in that way, would she have cleared the barge? *A*. I think she would.

Q. 29. Was there water enough? *A*. Oh yes, sir; I think there was.

Q. 30. Are you familiar with the channel here? *A*. I have been working there on that Point the last twenty years.

Q. 31. How wide is the channel from Sabin's Point Light to the westward shore? *A*. I could not say exactly; somewhere about nine hundred or one thousand feet there.

Q. 32. Is there deep water there, all the way over? *A*. All except about fifty or sixty feet outside of the lighthouse. I have raked oysters on there.

Q. 33. But the rest of it is all deep water? *A*. Yes, good deep water.

Q. 34. If she had held her course straight along, she could have gone to the eastward of her? *A*. Yes, sir.

Q. 35. Could she have gone to the westward? *A*. Oh, yes; better water to the westward, and more of it, too.

Q. 36. More of it? *A*. Yes.

Q. 37. Did you notice anything about her backing water? *A*. Could not tell about it, no.

Q. 38. How was it about the speed of the boats? Which was going fastest? *A*. To the best of my knowledge the Berkshire was, because the tide was running out pretty strong at the time, and she was going faster than the other boat was going with the tow and the ebb tide.

Q. 39. When she struck the barge what happened? *A*. She swung her stern and backed down to the eastward pretty near as far as the beacon, backed over towards Pawtuxet side and came up on the west side.

Q. 40. She went down between the barge and the lighthouse, and went up on the other side towards the city? *A*. Yes.

Q. 41. Did the barge sink where she was struck? *A*. No, sir; she did not. She went down the river her own length before she sank, before she settled.

Cross Examination by Mr. Carver.

×-*Q*. 42. You say that the tide was setting down stream? *A*. Yes, sir.

×-*Q*. 43. About how fast? How many knots an hour? *A*. I couldn't just exactly tell.

×-*Q*. 44. Give us your best estimate. *A*. Couldn't tell you. It was over half out, the tide was.

×-*Q*. 45. Would it be as fast as two knots an hour? *A*. I don't know. I could not exactly tell.

×-*Q*. 46. The tide runs pretty swift there, doesn't it? *A*. Yes; right there it does.

×-*Q*. 47. You think that the Berkshire was passing over the bottom faster than the barge, because the barge had a head tide and the Berkshire had a fair tide? *A*. Yes.

×-*Q*. 48. Which one was going fastest through the water, without reference to the tide? A. The Berkshire was.

×-*Q*. 49. In your opinion, if the head of the Berkshire had not swung to the westward, there would not have been any collision? *A*. Yes, that is my opinion.

×-*Q.* 50. Do you think the head of the barge swung any to the westward? *A.* I think the barge was going right straight up the channel.

×-*Q.* 51. You saw the tug swing to the westward? *A.* No; didn't notice it.

×-*Q.* 52. You know the tug went to the westward of the Berkshire? *A.* Yes, sir.

×-*Q.* 53. And you also know that the barge was struck on the starboard side; that was the right-hand side? *A.* The barge was struck like that; the Berkshire came right in and struck her like that, on the left-hand side.

×-*Q.* 54. Did you hear any more than one whistle? *A.* No, sir; didn't here any but one whistle.

×-*Q.* 55. Didn't hear any answer to it? *A.* No, sir.

×-*Q.* 56. How far was the Berkshire from the tug when that whistle was blown? *A.* Well, about a quarter of a mile. At least that; a little more, if anything.

×-*Q.* 57. Where was the Bay Queen? *A.* Right to the eastward of the Berkshire at the time.

×-*Q.* 58. She was between the Berkshire and the tug, the Bay Queen? *A.* No, sir; abreast of the Berkshire.

×-*Q.* 59. Where was the steamer Planet? *A.* She was right there; they were all about abreast of each other at the time the tug whistled.

×-*Q.* 60. You think the Planet was up the river as high as the Berkshire? *A.* Yes; at the black buoy.

×-*Q.* 61. Did you here any whistles from these boats? *A.* No, sir; I did not.

×-*Q.* 62. Could you have heard them? *A.* I think I could.

×-*Q.* 63. You heard the whistle from the tug? *A.* Yes, sir.

×-*Q.* 64. That is the only whistle you heard? *A.* That is the only one.

×-*Q.* 65. That was one long whistle? *A.* One long whistle.

Direct Examination resumed by Mr. Roelker.

Q. 66. You stated just now that the Berkshire struck the barge on the left-hand bow. Did you mean that, or was it — Just say if you meant that. Where were you? *A*. I was to the northeast.

Q. 67. You were in here somewhere? *A*. Yes; northbeast from the lighthouse.

Q. 68. The tug went off to the westward, and she came round, you say, with her stern swung round this way? *A*. Yes, sir.

Q. 69. Which side of the barge did she strike? *A*. The right-hand bow of the barge, and the left-hand bow of the Berkshire struck.

DEPOSITION OF ALBERT E. NICKERSON.

Direct Examination by Mr. ROELKER.

Q. 1. You are a police officer, or were? *A*. Yes, sir.

Q. 2. Of the city of Providence? *A*. Yes, sir.

Q. 3. You saw the collision between the Berkshire and the barge? *A*. Yes, sir.

Q. 4. Where were you? *A*. At the Rhode Island Yacht Club House.

Q. 5. Where is that? *A*. On the big rock up Pawtuxet Neck.

Q. 6. Can you point it out on this chart?

[*Witness marks* "R. I. Yacht Club" *on chart.*]

Q. 7. You were at the Rhode Island Yacht Club House? *A*. Yes.

Q. 8. What first attracted your attention? *A*. Well, I heard the whistles blowing over in that direction. I was in my boat mending the sail, heard these whistles blowing, and looked up.

Q. 9. Do you know how many whistles blew? *A*. No, sir.

Q. 11. Don't know who blew them? *A*. No, sir; I saw the Beakshire and some river boat passing each other.

Q. 12. Where was the Berkshire then? *A*. Passing the black buoy.

Q. 13. Did you then notice the tug and the tow? *A*. I did.

Q. 14. Where were they? *A*. Coming up, below Sabin's Point.

Q. 15. On which side of the channel were they? *A*. On the east side.

Q. 16. The Berkshire was on which side? *A*. She was going down.

Q. 17. Which side was she on? *A.* In the middle of the channel, about.

Q. 18. Do you know whether the tug blew a whistle? A. No. I heard whistles blow, but don't know how many, or who blew them.

Q. 19. What was the next thing you saw? *A.* I saw the river boat and the Berkshire pass each other, and saw the barge and the tug going up, because I was wondering which side of the barges the Berkshire was going, and I kept watch of her as they came together. The barge and the tug, the way they appeared to me, were on the bend, that is, where you round the Point to haul up towards Silver Spring, and when the Berkshire came down I imagined that she was going to go on the westward side, because the barge and the tug were on the east side, hugging the east side; so I watched them and saw the Berkshire go on the east side of the tug.

Q. 20. Did you notice the tug change her course? *A.* She slacked.

Q. 21. Did you notice the Berkshire change her course? *A.* Yes; she was coming down on the westward side, and she changed and came over to the eastward, and I said to myself, "How is she going to get inside of the barge, between here and the lighthouse?" Of course they kept coming nearer and nearer together, and the tug was a little ways ahead, and I thought to myself she was going to hit, and she did hit.

Q. 22. What time was this? *A.* It was about three o'clock. I took my watch out at the time, and I thought it was four minutes past three.

Q. 23. It is a habit of the force, I suppose? *A.* Well, when she walked into the barge I thought to myself it was an item for the Journal. They take items there until four o'clock, and I thought there was just time enough to get it in to the office. That is why I looked at my watch. It was either four or six minutes past three.

Q. 24. Did you notice any change in the course of the Berkshire? *A.* From where I was I didn't notice any change.

Q. 25. You are familiar with the channel down there? *A.* Quite.

Q. 26. I will ask you whether there was room enough for the Berkshire to have passed to the westward of the tug and the tow?

A. I should judge there was ample room. That is where I thought she was going. I didn't see how she could get on the inside.

Q. 27. What is the width of the channel there? *A.* I should think it was eight hundred or a thousand feet, perhaps wider.

Q. 28. Is it good deep water? *A.* I should say so, because right there there are no buoys. There is the Pawtuxet beacon on the west side, then there is Sabin's Point Light, and up here is a black buoy, and up here there are no buoys at all, and where there are no buoys you are supposed to give the shore a fair berth, that is all. It is supposed to be about eight hundred or one thousand feet wide. The barge and tug were hugging the east shore at the point.

Q. 29. When they struck did you see them? *A.* Yes, sir.

Q. 30. They struck how? *A.* The steamer struck the barge right on the bluff of the bow.

Q. 31. After that what did she do? *A.* She backed off. I think she didn't use any power at all; she might have, possibly.

Q. 32. You think she floated off? *A.* She might have steamed up a little. She went to the eastward of her and down. They sent a man out on the .... to look at the damages to her.

Q. 33. Did the barge sink just where she was struck? *A.* Well, she went down a little to the southward, probably once or twice her length.

Cross Examination by Mr. CARVER.

×-*Q.* 34. Did you notice the Berkshire slacken her speed before she struck? *A.* Well, I didn't; no.

×-*Q.* 35. Did you see any water round her wheel showing that she had reversed her engines? *A.* It appeared to me that she kept right along.

×-*Q.* 36. You didn't notice anything about that white water? *A.* No; I did not.

×-*Q.* 37. You didn't notice her swing at all? *A.* I could not notice unless she made a big sheer to one side or the other, because she was right square opposite.

×-*Q.* 38. When you saw the tug went to the west side of the Berkshire you thought a collision must take place? *A.* That is the impression I got.

×-*Q*. 39. You thought the only way to go was for the tug to go to the east side of the Berkshire? *A*. Yes, sir. I didn't see how the Berkshire could swing enough to get inside of her.

×-*Q*. 40. Did you see the tug change her course to the westward? *A*. I didn't see. I could not see. She slacked up.

×-*Q*. 41. You didn't see whether the tug changed her course or not? *A*. Couldn't say.

×-*Q*. 42. That is because you were opposite to her? *A*. Yes.

×-*Q*. 43. Did it look to you that the tug was just rounding the Point at the time of the collision? *A*. Yes, sir; I don't know that she made the turn.

×-*Q*. 44. If she was making the turn, she must go to the westward, mustn't she? *A*. She could go to the eastward if she liked.

×-*Q*. 45. Did you judge from what you saw that she was going to make the swing, and go to the westward? *A*. No.

×-*Q*. 46. Didn't form any opinion on that? *A*. What I thought was this,—it looked to me as if they could pass all right when they were coming down, but I thought they would come together when I saw she went on the east side. I said to myself there would be some trouble there. The Berkshire was coming at a pretty good speed.

×-*Q*. 47. There was a pretty good tide there, wasn't there? *A*. The tide runs there probably three knots.

×-*Q*. 48. The Berkshire was going with the tide? *A*. Yes, sir.

×-*Q*. 49. How fast do you think the tug and tow were going? *A*. Not very fast against the tide.

×-*Q*. 50. Think they were going five knots an hour? *A*. No. They might have been making that through the water, but they would not have been measuring that distance.

×-*Q*. 51. Did you hear any whistles from the Berkshire? *A*. I could not say.

×-*Q*. 52. It was the whistles that attracted your attention? *A*. Yes, but I couldn't tell one from the other, only I heard the whistles blow, and looked across and saw the steamer. There were whistles blown, but what they were I could not tell.

Direct Examination resumed by Mr. ROELKER.

Q. 53. When the barge and the Berkshire were off abreast of each other, how far did the barge appear to be from the tug? *A*. Well, she was over two hundred and fifty feet, I should think. That is the way it appeared to me.

Q. 54. That is the way it looked to you? *A*. Yes, sir; she was ahead; she had a hawser; about two hundred and fifty feet ahead.

Q. 55. She didn't change her course? *A*. Not apparently to me. She hadn't got up to where she needed to change her course to round the Point.

Q. 56. Was the barge directly behind the tug? *A*. She was towing right up after the tug at the time of the collision.

Q. 57. Did you form any opinion as to who was to blame for the collision? [*Objected to by* Mr. CARVER.] *A*. Yes, I did.

Q. 58. Well, what was that? [*Objected to.*] *A*. I think the Berkshire was to blame, for the simple reason that she went on the inside of the tugboat. The barge could not do anything. When the tugboat leaves them, or slacks up, she is helpless. That is why I formed the opinion.

Cross Examination resumed by Mr. CARVER, *de bene*.

×-*Q*. 59. If it is a fact that the reason why the tugboat went to the westward of the Berkshire was because the tugboat herself had changed her course, you would have formed a different opinion? *A*. Well, the tugboat didn't change her course, not to my knowledge.

×-*Q*. 60. If it was a fact that the reason why the tug went to the westward of the Berkshire was because the tug herself changed her course and swung so as to go to the westward, you would form a different opinion as to which of the two vessels was to blame? *A*. But the tug didn't change her course.

×-*Q*. 61. I asked you if she did. Will the stenographer please read the question? [*Question read.*] *A*. It is hard to tell what kind of opinion I would have formed then. I simply formed this opinion at the time; under different circumstances I might form a different opinion.

×-*Q*. 62. But you said that looking at the two vessels you didn't notice that either the tug or the Berkshire changed her course? *A.* That is, from the position that I was in; they were both opposite to me, and I didn't see as they did.

×-*Q.* 63. If it was a fact that, as those two vessels approached, the tug swung sufficiently to the westward to go to the westward of the Berkshire, it would bring the barge across the Berkshire's bow, would not it? *A.* Yes, it would, the way you state it, but those are not the circumstances.

DEPOSITION OF LOUIS A. BUDLONG.

Direct Examination by Mr. ROELKER.

Q. 1. Mr. Budlong, you live in Providence? *A.* Yes, sir.

Q. 2. Your business is what? *A.* House carpenter.

Q. 3. You saw the collision between the Berkshire and the barge last summer? *A.* Yes, sir.

Q. 4. Where were you at the time? *A.* I was over at Pawtuxet Neck, at Dr. Hasbrouck's.

Q. 5. What first called your attention to it? *A.* I was at the well getting water, and I looked off and saw the two steamers approaching, and heard the whistle blow.

Q. 6. Do you know which steamer they came from? *A.* I couldn't tell; there were three whistles blown there, very close together, but I couldn't tell what steamers blew.

Q. 7. When you heard the whistles blow you looked off, and what did you see? *A.* I saw the steamer and the barge in close proximity together. The steamer seemed to be going along at pretty full speed; and then it seemed to me she was backing, and then she whirled right round into the barge.

Q. 8. What made you think she was backing? *A.* By the way her stern swung.

Q. 9. Which way did her stern swing? *A.* Towards the lighthouse.

Q. 10. And her bow towards the barge? *A.* Towards the barge.

Q. 11. Had she passed the tug? *A.* She had passed the tug.

Q. 12. How far was she from the barge? *A*. Maybe one hundred feet from the barge.

Q. 13. Up to that time she had been going at a pretty good speed? *A*. Not quite full speed, I don't think.

Q. 14. Could you estimate it in knots? *A*. I don't know as I could; I don't know much about steamboat business.

Q. 15. Which side of the tug did she pass? *A*. She passed on the starboard side of the tug, between the tug and the lighthouse.

Q. 16. How close to it? *A*. She might have been a hundred feet from the tug.

Q. 17. The barge was right along behind the tug? *A*. The barge might have been two hundred or three hundred feet from the tug, and steering right along behind her, but when the Berkshire was close up the tug hauled right off on the port side, and the barge seemed to keep her course right as she was.

Q. 18. You say that the tug hauled off on the port side just about the time when the Berkshire passed her? *A*. When the Berkshire passed the tug I think the tug had stopped her speed. I couldn't see that she was going ahead any.

Q. 19. The barge kept right along? *A*. The barge, of course, had its headway.

Q. 20. When they came together how did they strike? *A*. The Berkshire struck the barge on the starboard side; the stern wheeled right round, and she went off broadside down the stream, between the barge and the lighthouse.

Q. 21. How far down did she go? *A*. Below Pawtuxet beacon.

Q. 22. If I understand you right, the tug changed her course about the time the Berkshire passed her? *A*. I don't think that the tug changed the course of the barge at all.

Q. 23. I am not asking about the barge; I am asking about the tug itself. It was quite a ways from the Berkshire when she struck the barge? *A*. Yes, sir.

Q. 24. According to the way you saw it, Mr. Budlong, the barge kept to her course, and the tugbort sheered off to the port, and she did that when she was very close to the Berkshire, as I understand? *A*. Yes, sir.

Q. 25. How close over to the lighthouse were the tug and the barge? *A.* I should think they were about three hundred feet off the light.

Q. 26. Do you know anything about the width of the channel there yourself? *A.* Not exactly, but I should judge it was eight hundred or nine hundred feet wide there. It may be more than that.

Q. 27. They were to the eastward of the center of the channel? *A.* Yes, sir.

Q. 28. When you first saw the Berkshire where was she? *A.* The Berkshire was about five hundred feet north of the red buoy above the lighthouse.

Q. 29. Towards the black buoy? *A.* Yes, only she was on the east side of the channel.

Q. 30. Was the towboat on the east side of the channel when you first saw her? *A.* Yes, sir.

Cross Examination by MR. CARVER.

×-*Q.* 31. Then you saw the tug apparently swing to the westward? *A.* The tug swung to the westward.

×-*Q.* 32. And you noticed that the barge did not swing the same way the tug did? *A.* The barge did not seem to swing any at all. I think the barge had slacked up some time before the tug changed her course, because the line lay slack — you could see that.

×-*Q.* 33. Then, at the time of the collision, the barge was not steering directly behind the tug? *A.* At the time of the collision it didn't look to me as though the barge was going at any speed at all.

×-*Q.* 34. But she was not directly behind the tug? *A.* No, the barge was not.

×-*Q.* 35. You mean when you say you don't think there was any particular speed, there was no particular speed over the ground? *A.* No; of course you know the tide was going down then pretty strong. The tug went to the westward, and for some reason or other the barge didn't seem to swing the same way, but kept the same course she had.

×-*Q.* 36. She didn't steer behind the tug? *A.* No.

DEPOSITION OF JOHN F. WEEDEN.

Direct Examination by Mr. ROELKER.

Q. 1. You have been lighthouse keeper at Sabin's Point how long? *A.* Nineteen years.

Q. 2. You were not there on the day of the accident? *A.* No, sir.

Q. 3. You are familiar with the channel and the depth of water there? *A.* Never sounded there a great deal.

Q. 4. You know where the channel is? *A.* Yes, sir.

Q. 5. Please tell me what the width of the channel is from the lighthouse, westward. *A.* Eleven hundred or twelve hundred feet.

Q. 6. And from the red buoy, westward? *A.* It goes in there a long way. It is wider, I find there, than I ever supposed it was.

Q. 7. You were there and assisted them in making these soundings that Mr. Schofield made? *A.* Yes, sir.

Q. 8. How far up is it that width? *A.* I think clear up to that red buoy. I always supposed it was shallower in there than it really was.

Cross Examination by Mr. CARVER.

×-*Q.* 9. The buoys that are up there are supposed to mark the nineteen-foot channel? *A.* The red buoy is supposed to be in sixteen feet.

×-*Q.* 10. And these buoys are supposed to mark the channel to the east and to the west? *A.* Yes.

×-*Q.* 11. And how far are the buoys apart, right across? *A.* There is no buoy opposite the red one.

×-*Q.* 12. How from the black buoy to one that would be opposite the red buoy? *A.* The black buoy is about one third miles above the red buoy.

×-*Q.* 13. Taking the channel as marked by the buoys, how wide would the channel be? *A.* I could not say that, because they stand altogether different, and not opposite to each other.

Direct Examination resumed by Mr. Roelker.

Q. 14. You say they dug out that channel ten years ago? *A.* Yes; but that is up above the red buoy.

DEPOSITION OF N. W. H. SUTTON.

Direct Examination by Mr. Roelker.

Providence, Oct. 15, 1894.

Q. 1. Please state your name, residence and occupation. *A.* N. W. H. Sutton; residence, North Attleboro; manager of the Providence Towboat Company, and captain.

Q. 2. How long have you been engaged in the towboat business in Narragansett Bay and the harbor of Providence? *A.* Thirty consecutive years.

Q. 3. During that time how frequently have you taken tows up and down the harbor and through the bay? *A.* Oh, all the time.

Q. 4. You are a captain of tugboats yourself? *A.* Yes, sir.

Q. 5. And a pilot in these waters? *A.* Yes, sir.

Q. 6. I will ask you what the custom is about towing barges and other vessels behind towboats in Narragansett Bay and the harbor of Providence. *A.* Well, on a hawser below; alongside in docking.

Q. 7. How general is that custom? *A.* It is everybody. It is very seldom that a vessel will come up the river alongside.

Q. 8. It is almost universal then, is it? *A.* Yes, sir.

Q. 9. How long has this custom existed? *A.* As long as I have been in the business.

Q. 10. Are you familiar with the custom of towing along the Atlantic coast in other ports and harbors besides Providence? *A.* No, sir. My business is devoted to Providence.

Q. 11. What should you consider a proper and safe length of tow line for a towboat to bring a barge about two hundred and ten feet in length, with seventeen hundred and sixty tons of coal on board, and drawing about nineteen and a half feet of water, up past Sabin's Point and towards the port of Providence? *A.*

Well, I shouldn't want less than seventy-five, but I would rather have one hundred. I could handle her safer with one hundred than with seventy-five.

Q. 12. Seventy-five what? *A*. Fathoms.

Q. 13. Fathoms of tow line between the two boats? *A*. Yes, sir.

Q. 14. Why could you handle her safer? *A*. She is further away from the quick-water, and it throws her off independent so she will steer better further away than she will close to.

Q. 15. Which do you consider the safer way of bringing a barge of that size up into the Providence River,— on a tow line or by towing her alongside? *A*. On a tow line.

Q. 16. Well, give your reasons, please. *A*. If I have her on a hawser, she follows me and can follow me; and if I have her alongside — I can't have her alongside unless it is very moderate weather; that is impossible. She has got to be on a hawser. If it is a calm time, and I wanted to go alongside for convenience, to talk with the captain, or with a small tow, and he should invite me to dinner or something of that kind, I should put myself out in that way to come alongside — discommode myself for accommodation.

Q. 17. But what are the comparative advantages and disadvantages? *A*. It is a disadvantage to be alongside, for safety.

Q. 18. Why is it a disadvantage? *A*. There is that tow alongside. Now, if I am out ahead of a hawser, I pass anything that is coming. That gives them to know where and how to go the whole length of that tow line. If I am alongside, and we are coming up to him head to head, and he is liable to strike shoal water or something, I have no redress but to back, and that throws me out of position.

Q. 19. What do you mean by that? *A*. If he is going to hit me, the only thing is to try to back.

Q. 20. But you haven't so full control of the barge as of your own vessel? *A*. Not at all.

Q. 21. Now, supposing that a man came up towing a barge of the size which I have described past Sabin Point Light, on a tow line of forty to fifty fathoms. Should you consider it possible for him to tow with any shorter line than that? *A*. I don't want one for me as short as that. The quick-water from the tug acts on the bow of the barge or vessel, and they can't steer her well. It makes her sheer around one way or the other.

Q. 22. Have you ever heard, or is there any law, rule or regulation, by anybody or constituted authority, requiring that you should not tow on a hawser in Providence River or in Narragansett Bay? *A*. No, sir.

Q. 23. How frequently do tugs and tows go up and down this river, being towed on hawsers of the kind which you have described? *A*. Oh, all the time; every day, and lots of them.

Q. 24. What is the width of the channel or of the water, for a vessel drawing between fourteen and fifteen feet of water, in that part of the bay which lies westward of the red buoy north of Sabin's Light, and Sabin's Light itself? *A*. Now, I should call it between ten and fifteen hundred feet.

Q. 25. Is it nearer fifteen or ten? *A*. I should say it is nearer fifteen.

Q. 26. Nearer fifteen hundred feet? *A*. I should think so. I should say it was nearer fifteen hundred feet.

Q. 27. Would it be less than ten? *A*. No, sir; no, sir.

Q. 28. Have you seen, in your observation as a master mariner of towboats, and plying about in your vocation, them try to stop propellers of the size of the Berkshire, say two hundred and sixty feet long, when running at full speed? *A*. Well, I won't say that I have at full speed; but I have at half speed, maybe a little more than half speed.

Q. 29. You have seen them try to stop them as soon as they could? *A*. Seen them stop and reverse.

Q. 30. You are acquainted with the Berkshire? *A*. Yes, sir; well.

Q. 31. How long woold it take, in your opinion, to stop the Berkshire running at about eight knots an hour, with the tide running two knots, and the vessel drawing about fourteen and one half feet of water, little or no wind? [*Objected to by* Mr. GREEN *on the ground that the witness hasn't shown any familiarity with either the management or the machinery of the Berkshire.*] *A*. Well, I don't think they could do it in five minutes.

Q. 32. Would it be possible, in your opinion, for them to do it in a minute and a half? *A.* Well, I should think that was impossible. [*Same objection by* Mr. GREEN.]

Q. 33. Now, Captain, suppose the master of a vessel like the Berkshire, drawing 14.6 aft and 11.5 forward, two hundred and sixty feet in length, and of her size and dimensions, proceeding down the bay at full speed, say of about eight knots an hour, on a clear day, with smooth sea, light wind, ebb tide, should find himself in a little to the westward of the center of the channel at the first black buoy above Sabin's Point Light, and with a clear channel between him and Sabin's Point Light, and that he should see a towboat towing a barge two hundred and ten feet long, on a hawser ninety to one hundred fathoms long, coming up the bay just about rounding Sabin's Point Light, close in to the light on the easterly side of the channel, what, in your opinion, from your experience as a master mariner, would be the proper and prudent and seamanlike course for the master of the Berkshire to pursue? *A.* One whistle, and go to the right. There ain't any other.

Q. 34. Give one blast of the whistle? *A.* One blast of the whistle and port your wheel.

Q. 35. And keep to the right, *i. e.*, on the west side of the channel? *A.* On the west side of the channel.

Q. 36. Where would be the water for him under those circumstances, from your knowledge of the course? *A.* To go to the right. The water is there — plenty; more room. If he went to the left it required a navigable man to do it. It would require a man that understood it as I do, to do it.

Q. 37. Understood the local conditions — *A.* Of the river. He don't know the bank as I know it.

Q. 38. Then you would say that the water lay on the right? *A.* Yes, sir.

Q. 39. And that he should keep on the right-hand side of the way? *A.* He is obliged to. The law says he must. That is the way I read it.

Q. 40. What would you do about the speed? *A.* He could go at the same speed if he had gone to the right, because there was no bank to throw him.

Q. 41. Well, now suppose that on the same day, and under the same conditions as to wind and weather and tide, the master of a tugboat one hundred and thirty-five feet in length, drawing fourteen feet, and towing a barge two hundred and ten feet long, which drew nineteen feet aft and eighteen forward, by a hawser from ninety to one hundred fathoms long, going at the rate of five or six knots an hour, both tug and barge being on the easterly side of the channel, should, when a little below Sabin's Point Light, see a steam propeller of the dimensions of the Berkshire at or near the black buoy above Sabin's Point, in the centre or to the westward of the channel, with a clear channel between them, what, in your opinion, would be a proper or seamanlike course for the master of the tug to pursue? *A*. One whistle and go to the right.

Q. 42. What would be his course in steering around the Point — his proper course there? *A*. He runs about north, and then almost north by east, I do, and then a little further north northeast. It all depends on my draught.

Q. 43. And how close could he pass to the Sabin Point Lighthouse and be safe with that draught? Four or five hundred feet? *A*. Yes, about that.

Q. 44. That would be as close as he could safely go? *A*. I would rather have seven hundred.

Q. 45. You have seen this sunken barge where she lay in the channel after the accident? *A*. Yes, sir; I have been by it several times.

Q. 46. You didn't see the accident itself? *A*. No, sir.

Q. 47. From the position of the barge in the channel, should you say that she was as far to the east as would have been safe and prudent for her to go? *A*. Yes, sir; farther than I would have gone if I had had her in tow.

Q. 48. Now, suppose that the master of the propeller which we have spoken of, under the conditions named, should give no signal at all, and should attempt to pass to the eastward of the tug; I understand you to say that you would consider that poor seamanship? *A*. Certainly.

Q. 49. Now suppose, in addition to that, that the tug having, when he was close upon her, given a sudden sheer by starboarding her wheel so as to head her up north in a line with the tow, and the

Berkshire had cleared her, would you, in your opinion, consider it good seamanship for him to reverse his engine at full speed in order to clear the tow? *A*. I should not. If I had been in the pilot house I would have stopped her and then gone ahead again with a hard to starboard wheel, and I doubt if she would have touched her. I don't think she would have touched the barge.

Q. 50. Gone ahead slow? *A*. Gone ahead slow.

Q. 51. Will you give your reasons for this opinion, Captain? *A*. When he is going ahead — this bank is very quick on this port side —

Mr. GREEN. On the port side of the steamer going down? *A*. Yes, sir; on the east side. It is up and down like that [*illustrating*]. When she goes out of good water, and the pressure of that steamer going through, she falls off and it throws her, and the wheel is no use at all. She runs from there. You can't run parallel with that bank. You can't run a steamer ashore running parallel with a steep bank. She will go on the other side of the river and go ashore. The pressure of a steamer going will force that hard that the pressure throws her away. If he had stopped her until she had lost her pressure, merely held up and gone ahead, she would have got by as she went away from this bank, and got the water below the Point. She would have deepened again and gone about her business.

Q. 52. Passing starboard of the barge? *A*. Yes, sir.

Q. 53. What effect does the backing of the propeller have on the direction of a vessel? *A*. Generally, more than two thirds of the time — once in awhile they will go the opposite way — to swing her head to starboard with all propellers.

Q. 54. And her stern to port? *A*. Yes, sir.

Q. 55. So that the effect of backing her at full speed was to throw her head to starboard? *A*. Head to starboard and stern to port.

Q. 56. Which would tend to throw her into collision with the barge? *A*. Certainly.

Q. 57. Whereas, if he had not backed her, you think that he could have kept her head to port and escaped the collision? *A*. I certainly do.

Q. 58. Now, if a collision occurred under the circumstances which I have described to you in the language previously put, that is to say, the captain of the propeller had given no whistle and had undertaken to pass on the easterly side of the tug and tow, and the captain of the tug had blown one whistle before coming to Sabin's Light, and had then continued to hug the easterly side of the channel, reducing his speed, who would you say was to blame for a collision, if one occurred between the propeller and the barge? *A.* Why, certainly the one that didn't answer any whistle. According to the law he is obliged to answer.

Q. 59. You mean the propeller? *A.* Yes, sir.

Q. 60. I will now ask you whether you know any difference between a right-handed and a left-handed propeller. *A.* This is the first I ever heard of it.

Q. 61. What are all propellers, so far as you know? *A.* All right-handed propellers.

Q. 62. They all turn that way? *A.* Yes, sir.

Cross Examination by Mr. Green.

×-*Q.* 63. Captain Sutton, when you speak of wanting, for such a tow as has been described in your direct evidence, a tow line seventy-five or one hundred fathoms, giving as you did your reasons for it, did you or did you not refer entirely to the convenience and safety of the towboat — the towing tug — and of the tow behind it? *A.* Yes, sir; for the whole tow.

×-*Q.* 64. Then such is the length of tow line — seventy-five or one hundred fathoms — that you would require to use in case you were in open waters with plenty of room? A. Yes; or close.

×-*Q.* 65. Now, suppose — I ask you as an expert — you were, with a tow line of one hundred fathoms, connecting a towboat of one hundred and thirty or so feet with a tow behind it, quite heavy and two hundred feet in length, going up a crooked channel and rounding a curve in which the channel was from one thousand to one thousand five hundred feet wide; the sum of the one hundred fathoms of tow line, of the length of the tow two hundred feet, and of the towboat one hundred and thirty, making nine hundred and some odd feet, would there or would there not, in your opinion, be any danger of the towing steamer, the tow line and the towed boat taking up pretty nearly the whole of the channel? *A*. Well, no, sir.

×-*Q*. 66. The channel, you say, is a thousand feet wide? *A*. Yes, sir.

×-*Q*. 67. It is crooked, and you are going around a curve. *A*. Yes, sir.

×-*Q*. 68. And the entire length of your tow is six hundred plus two hundred plus one hundred and thirty. *A*. It is just the same as with a horse railroad track. It is not a line; you don't cut off; you sweep around the curve. I have had six vessels. I have taken six — yes, I have taken more — I think I have taken eight the whole length of the river.

×-*Q*. 69. Then, in your judgment, it makes no difference whether you are in open waters or whether you are in a comparatively narrow and somewhat crooked channel, in regard to the length of tow line that is advisable to use? *A*. Certainly, not at all. I will say this: That if it was a light vessel and the wind was blowing her one side, that would make a difference. I should have her on a shorter tow line, because she is handier.

×-*Q*. 70. Then if, in approaching these narrower waters, the towing steamboat should shorten up the tow line from one hundred fathoms to say fifty fathoms, you think that would be bad seamanship or not? *A*. Yes, sir; bad. The quick-water from the boat has a tendency to sheer her. It makes a tideway. If we have eight vessels, we will have the first vessel on one hundred fathoms. Fifty would do for all the other tows, because they are away from the quick-water; but the first one wants to be seventy-five or one hundred fathoms.

×-*Q*. 71. Is there, in going in these narrow channels, towing on a curved line in order to pass a bend in the river, usually any risk of sheering off on the part of the towboat or of the towed barge? *A*. No; not if the man knows his business; no risk at all.

×-*Q*. 72. Captain, allow me to ask you whether in years gone by, during the time that you have been occupied actively as a towing master, there have not been repeated rubbings and differences of opinion between you and your friends in this Providence Towboat Line, and the steamers running in the bay, in regard to the length of these tow lines used? *A*. Not at all. Never had any complaint.

Not at all. I am in perfect harmony with all the lines, and do their work for them.

×-*Q*. 73. Whether there have not been repeated differences or opinion; that you gentlemen who run these towboats wanted long lines, and the local steamboat owners wanted shorter ones? *A*. I don't know; they have a new captain about every summer, taken off of a farm, and they might want something that I don't understand.

×-*Q*. 74. Practically, there has been at times want of harmony? *A*. I never heard of it until this collision.

×-*Q*. 75. I had an impression that at times there would be break-downs for the last twenty-five years. *A*. The first I have heard of it. I have seen it in the papers, and that is all. No complaint to us, but I have seen it in the papers about having long tow lines.

×-*Q*. 76. Never before this collision? *A*. No, sir.

×-*Q*. 77. Then, when you speak of it being an advantage, or rather good seamanship on the part of the towing tug, to use a hundred-fathom line in going through these narrow channels, you base your opinion on the fact that the barges behind will follow the direct line of the curve itself traced out by the towing steamboat? *A*. Yes, sir; she could follow it better with a long line than with a short one.

×-*Q*. 78. Now, I understood you to say this channel was from a thousand to fifteen hundred feet wide for vessels drawing from fourteen to fifteen feet of water. *A*. Yes, sir.

×-*Q*. 79. Do you reckon that measure of one thousand to fifteen hundred feet from the Sabin's Point Light? *A*. Oh, no; the depth they can go in.

×-*Q*. 80. The extreme western limit of this navigable channel would be about how far west of the Sabin's Point lighthouse itself? *A*. Well, three or four hundred feet further. There is only nine feet of water where the lighthouse is.

×-*Q*. 81. Then you would want to add roughly four or five hundred feet? *A*. Well, four.

×-*Q*. 82. And you would say that the channel would be from fifteen hundred to two thousand feet, starting from the Sabin's Point lighthouse? *A*. Yes, from the lighthouse.

×-*Q*. 83. If you wanted, in your judgment, to run your tow, assuming your tow to be such as Mr. Roelker has described, some seven hundred feet from Sabin's Point Light, that would bring your tow, as you came up, about in the middle of that channel? *A*. About in the middle. That is where I would be without anything approaching.

×-*Q*. 84. Have you ever examined the steamer Berkshire, *i. e.*, have you ever been aboard of her? Do you know personally anything about her machinery and the way in which she answers to her machinery and helm? *A*. No, sir; I don't know as I have rung her bells. I have docked her a great many times. I don't know about the machinery.

DEPOSITION OF WALTER E. SUTTON.

Direct Examination by Mr. Roelker.

Providence, Oct. 23, 1894.

Q. 1. Mr. Sutton, please state your residence and occupation, and how long you have followed your present calling. *A*. I live in East Providence; my occupation is master of a tugboat; I have been in that position twenty-three years.

Q. 2. Where have you run these tugboats particularly? *A*. Between Providence and Newport, in the bay and harbor.

Q. 3. Narragansett Bay and harbor? *A*. Yes, sir.

Q. 4. And Providence? *A*. Yes, sir.

Q. 5. What has been the custom during the period that you have been engaged in this business, and what is the custom now, about towing barges in Narragansett Bay, or from Conanicut Light up into Providence harbor, on a hawser? *A*. We do on a hawser.

Q. 6. How frequently is this done? *A*. Oh, more times than it is done otherwise.

Q. 7. How many barges should you say, on an average, are towed in and out of Providence harbor every week? *A*. Well, barges and vessels, as near as I can tell, somewhere about fifty, I should say.

Q. 8. Forty or fifty barges and vessels a week? *A*. Yes, sir.

Q. 9. And you say the greater portion of them are towed on a hawser? *A*. Yes, sir.

Q. 10. Have you ever heard of any rule or regulation by any constituted authority whatever against it? *A.* I have not.

Q. 11. Or any objection? *A.* No, sir.

Q. 12. Do you think there is any particular danger to the tug and tow or other vessels in towing in this way on a hawser? *A.* I do not.

Q. 13. What are the comparative advantages and disadvantages in towing on a hawser and towing alongside, in your opinion? *A.* If you have got the barge alongside and going up the river, if you stop and back her you throw your barge out of position. If you have her on a hawser, and have got a good long hawser, you can show the boat that is coming down the river your position, whatever side you are to him, and the barge or whatever you have in tow follows.

Q. 14. It follows close along behind the tug? *A.* Yes, sir.

Q. 15. In the same course? *A.* Yes, sir.

Q. 16. What length of hawser should you consider a proper hawser to use for towing a barge say two hundred and ten feet over all, and drawing nineteen and one half feet aft and carrying seventeen hundred and sixty tons of coal? *A.* Seventy-five or eighty fathoms or ninety fathoms; the longer the better.

Q. 17. What would be the shortest hawser you would dare to tow with? *A.* With that style of barge, if I was the master of the tug, I shouldn't want to go up with a hawser shorter than fifty or fifty-five fathoms, because you couldn't hold your barge.

Q. 18. What is the difficulty? *A.* With a short hawser?

Q. 19. Yes. *A.* Your quick-water from the wheel will throw your barge first one way and then the other, striking first on one bow and then the other, so that she doesn't follow the boat.

Q. 20. Now, you are acquainted with the Berkshire? *A.* Yes, sir.

Q. 21. And you knew this barge N. & W. 4? *A.* Yes, sir.

Q. 22. Suppose the master of a vessel like the Berkshire, drawing fourteen and one half feet aft and about two hundred and sixty feet long, were proceeding down the bay at full speed, about eight knots, on a clear day, with a smooth sea, light wind, ebb tide, and he should find himself a little to the westward of the centre of the channel at the first black buoy above Sabin's Point Light, and a clear channel between him and Sabin's Point, and should see a towboat towing a barge like the N. & W. 4, two hundred and ten feet long, on a hawser ninety to one hundred fathoms long, coming up the bay, just about rounding Sabin's Point Light, and close into the light on the easterly side of the channel, what, in your opinion, would be the proper and prudent and seamanlike course for the master of the propeller to pursue? *A.* Blow one whistle, port his wheel and go out around the tow. That is the only proper course.

Q. 23. You mean go to the westward of the tug? *A.* Blow one whistle, and go to the westward of the tug right around. That is where the water is.

Q. 24. And suppose the captain of the towboat to be on this towboat that is rounding Sabin's Point Light, the tug being one hundred and thirty-five feet in length, and drawing fourteen feet of water, and towing a barge two hundred and ten feet in length that drew nineteen feet aft and eighteen and a half forward, on a hawser from ninety to one hundred fathoms long, at the rate of five or six knots an hour, suppose both tug and barge to be on the easterly side of the channel, and when a little below Sabin's Point Light he should see the steamer or propeller, of the dimensions mentioned of the Berkshire, at or near the black buoy above Sabin's Point Light, in the centre or westward of the centre of the channel, with a clear channel between them, what, in your opinion, would be the proper and seamanlike course for the master of the tug to pursue? *A.* Blow one whistle, and go up on the eastern side of him. That is the law.

Q. 25. He should blow one whistle and keep on the east side of the channel? *A.* Yes, sir.

Q. 26. Now, suppose him to blow one whistle and to keep on his course up to the east side of the channel, as near to Sabin Point Light as he could — *A.* The tug?

Q. 27. Yes. Would there be any difficulty in the Berkshire passing to the westward of him? *A.* No, sir.

Q. 28. Suppose the master of the Berkshire should see this tug and tow when they were below Sabin's Point, and the tug apparently headed across the channel, would he be justified in concluding that the tug was going way over to the west side of the channel? *A.* No, sir; not if he knew where the water was in the channel.

Q. 29. Not if he knew the channel? *A.* No, sir; not if he understood the channel, he wouldn't.

Q. 30. What would be the proper inference for him to draw as to the course that the tug was about to pursue? *A.* For the steamer?

Q. 31. Yes. *A.* To keep to the westward and go down.

Q. 32. What would he have a right to believe that the tug was going to do? *A.* He would have a right to believe that the tug would pass to the eastward.

Q. 33. That the tug would change her course after rounding the Point? *A.* Yes, sir.

Q. 34. What would he have a right to believe as to the course that the barge would pursue? *A.* Follow the tug.

Q. 35. Follow around the same circle? *A.* Yes, sir.

Q. 36. Would he, or not, be justified in the opinion that because, when he was below the Point, he was apparently headed across the channel as it was below the Point, he was going to steer over to the west side of the channel? *A.* No, sir.

Q. 37. Now, suppose that, instead of blowing one whistle and passing to the starboard, the master of this steamer Berkshire should blow no whistle at all, and should try to run down to the eastward, between the tug and tow and Sabin's Point Light, what should you say of that? *A.* Well, I would be getting pretty nervous if I had the tow, because I should think there would be a collision.

Q. 38. You think that would be bad seamanship? *A.* Yes; because there is a bank, and a steamer under headway would run from that bank.

Q. 39. Suppose the Berkshire should keep on at full speed until she was liable to come into collision with the barge, and then, after the tug had sheered out of her way and she was pretty close to the barge, she should stop and reverse her engines at full speed, do you think that that would be the best thing that she could do under the circumstances? *A.* Not if they were close together; because when you have a boat with any headway on at all, when you back them they will throw their bow to starboard invariably, in my experience in boats.

Q. 40. It would have a tendency to bring about the very collision they were seeking to avoid? *A*. Yes, sir. But in some cases, if you are coming very close, you can slow down and stop, and then start your boat ahead again slow, and get around and clear the boat you are trying to avoid, where if you backed you might hit it.

Q. 41. So that, in your opinion, it would have been better to have slowed down and stopped, and then gone ahead slow, instead of reversing the engines and backing full speed? *A*. Well, I should think so.

Cross Examination by Mr. Green.

×-*Q*. 42. Are you a relation of Mr. Nathaniel Sutton? *A*. I am his son.

×-*Q*. 43. In the same business? *A*. Yes, sir.

×-*Q*. 44. You have been associated with him for some time? *A*. Yes, sir; twenty-three years.

×-*Q*. 45. There is quite a family of you in the business together, is there not? *A*. There is two brothers of us and the old gentleman.

×-*Q*. 46. Your father? *A*. Yes, sir.

×-*Q*. 47. I presume you are quite in accord, are you not, the father and the two sons, as to the mode in which you conduct your towing business? *A*. Yes, sir; I suppose we are.

×-*Q*. 48. Have you talked with your father at all about this matter? *A*. No, sir; I have not.

×-*Q*. 49. When you speak about using these long hawsers you assume, do you not, that it at all times is in the power of the following tow to keep in the path that is indicated exactly by the towing boat? *A*. If they have got a long hawser, the towed boat can follow the towing tug right to the letter.

×-*Q*. 50. Now, suppose there is any wind, or suppose there is any tide, or suppose there is anything else that would either shorten the curve of the towing line or would cause a sheer, will you still maintain your opinion as to the advantage in a narrow and crooked channel of a long towing line over a short? *A*. Yes, sir. If you can give that barge steerage way she can follow you around the circle.

×-*Q*. 52. In going around a curve, your experience is, then, that there is no danger of the bow of the following towed boat being so pulled as to shorten the curve at all? *A*. No, sir; not with a long hawser.

×-*Q*. 52. Now, some hypothetical questions have been put to you. Let me ask you one or two. Suppose a steamer like the Berkshire is going down the river on the east side of the channel, well up, — a supposition already made to you, — and after that she was on the other side; and suppose just below Sabin's Point she sees a towboat with a long hawser and a coal barge following in tow, so that apparently the entire tow fills up most of the apparent channel, what, in your opinion, will be the proper thing for the boat to do? *A*. To blow one whistle and go to the westward of the tow. I don't care what position the Berkshire is in. At that distance apart, that is her only way to go — to go to the westward of the tow.

×-*Q*. 53. You don't care what the apparent position of the towboat and the line of the tow is? *A*. Not at that distance apart; no, sir.

×-*Q*. 54. Are there other concerns in the bay besides yourselves which do any amount of towing, that you know? *A*. Well, not local; but there are towboats that come through from New York. We are the only local towboats here anyway.

×-*Q*. 55. Now, in your practice, when you are bringing a heavily loaded tow, about, say, two hundred feet long, up the river, do you use a hawser ninety or one hundred fathoms long? *A*. We have it anywhere from seventy-five to eighty fathoms long, and longer if we can get it.

×-*Q*. 56. Is that the length of hawser that you are using now? *A*. Yes, sir. We have one of our own for that purpose going between Newport and Providence, towing barges. Both of the tugboats have got them. About one hundred fathoms.

×-*Q*. 57. Then in the judgment of your family, as experienced towboat pilots, you think the same length of hawser is possible to be used in a narrow channel and crooked channel as is used in the open sea? *A*. Well, as I say, when you have got a long hawser you control your tow.

×-*Q*. 58. Answer my question, please. In the experience o yourself and your family, your evidence is that the same length of hawser is as possible to be used in a narrow and crooked channel as it is in the open sea? *A.* Yes. But I don't know about the testimony of my father or other brother. I am only answering for myself. I don't know what testimony he has given, and I don't know what the opinion of my brother is.

DEPOSITION OF WILLIAM J. BARTLETT.

Direct Examination by Mr. Roelker.

Providence, Nov. 19, 1894.

Q. 1. Please state your residence and occupation. A. Norfolk, Va.; master of tug Mars.

Q. 2. How long have you been engaged in the towboat business, altogether? *A.* Five and a half years.

Q. 3. How long have you been master of a towboat? *A.* Four years.

Q. 4. Where have you been in the habit of running with your towboat? *A.* The entire coast.

Q. 5. Towing what? *A.* Coal barges.

Q. 6. Have you during this period frequently come into Providence River? *A.* I have been running here very near four years.

Q. 7. You are acquainted with the river, then? *A.* Yes, sir.

Q. 8. I will ask you what is the custom, on the Atlantic coast, in the United States, and particularly in Providence River, about towing barges on a hawser. *A.* It is frequently done; many a time.

Q. 9. How frequently? *A.* Well, almost every one that comes up this river tows on a hawser.

Q. 10. How about other rivers and harbors along the coast? *A.* The same way, — wherever I have been.

Q. 11. It is done every day, is it not? *A.* Yes, sir.

Q. 12. Is there any rule or regulation, of any board of authority, that you ever heard of, against it? *A.* No, sir.

Q. 13. Is it considered in any way a dangerous or improper thing to do? *A.* I never heard tell of it.

Q. 14. What are the comparative advantages and disadvantages of towing a barge on a hawser or alongside? *A.* In towing on a hawser you can handle your boat better. When you see about coming down, you can give him signals, — port or starboard, — whichever way you want to, — and the tow will follow along better. If you are alongside, if you have to go back, it throws your tow out of position, especially in a narrow channel. In starting ahead you are apt to take the bottom, on either side. I have done it many a time, in different places.

Q. 15. Do you consider it more advantageous to tow on a hawser than alongside? *A.* Yes, sir.

Q. 16. Is there any more danger to any other craft in the river from your doing so? *A.* None whatever.

Q. 17. Does your tow and barge take up any more room in the width of the channel? *A.* They don't take up as much as they do alongside.

Q. 18. Why is that? *A.* Because two of them together make it much wider, and in following up on a hawser the barge keeps right after the tug, and it gives you more room to go between.

Q. 19. What should you consider a proper length of tow line, to tow with in Providence River, for a tug towing a barge drawing nineteen and one half feet of water, carrying seventeen hundred and sixty tons of coal? *A.* I should say from fifty to eighty fathoms would be the length of line.

Q. 20. Would you want to make it any shorter than fifty fathoms? *A.* No, sir; not if I could get along with the line.

Q. 21. What is the advantage or disadvantage of the short line? *A.* The action of the propeller strikes the barge, and it makes it sheer around, and you cannot steer her with a short hawser.

Q. 22. Suppose the master of a vessel like the steamer Berkshire, drawing fourteen and a half feet aft, and eleven and a half feet forward, two hundred and sixty feet long, proceeding down the bay at full speed, — about eight knots — on a clear day, with smooth sea, light wind and ebb tide, should find himself a little to the westward of the centre of the channel, at the first black buoy above Sabin's Point Light, with a clear channel between him and Sabin's Point, and should see a towboat towing a barge two hundred and ten feet long, on a hawser ninety to one hundred fathoms long, coming up the bay, just about rounding Sabin's Point Light, close into the light, on the easterly side of the channel, what, in your opinion, would be the proper, prudent and seamanlike course for the master of the Berkshire to pursue? *A.* To keep on the right, blow one blast, and port his wheel, — keep the westward side of the channel.

Q. 24. Suppose the master of the tug, being below Sabin's Point Light, should see the propeller, of the dimensions mentioned in the last question, at or near the black buoy, going down the stream, what would be his duty? *A.* It would be his duty to blow one whistle, and port his wheel and pass port to port.

Q. 25. Now, if, under the foregoing circumstances, the Berkshire should give no signal and should keep on, going down at full speed, until within about a minute of the collision with the barge, and attempt to pass to the eastward of her, what would be your opinion of his prudence and good seamanship? *A.* I should not think the man knew his business.

Q. 26. Suppose that he, with a right-handed propeller, should back at full speed, about a minute before the collision occurred, would that be good judgment, in your opinion? *A.* Poor judgment. Of course if he is going back on her it would throw the steamer's bow to starboard and be apt to strike the barge.

Q. 27. What should you think he ought to have done under those circumstances? *A.* He ought to have stopped his ship and waited.

Q. 28. You say you have been running into Providence during these four years. Did you see the spars of the barge N. & W. 4 sticking out of the water in the harbor here during the fall of 1893? *A.* Yes, sir.

Q. 29. You noticed her location? *A.* No, sir; I can't exactly say I did.

Q. 30. You passed her? *A.* Yes, sir.

Q. 31. Which side did you pass her? *A.* The westerly side.

Q. 32. How much water was the barge drawing as you passed to the westward of her? *A.* Nineteen feet.

Q. 33. How far to the westward did you pass from her? *A.* Well, probably fifty feet.

Q. 34. Whereabouts were you in the channel, from your knowledge of it, when you passed fifty feet to the westward of her? *A.* Right in mid-channel, to the best of my judgment.

Q. 35. Then fully half of the channel was to the westward of you at that time, was it? *A.* Yes, sir.

Cross Examination by Mr. GREEN.

×-*Q.* 36. In whose employ are you? *A.* Bartlett & Shepard.

×-*Q.* 37. Do they own the tug Mars? *A.* Yes, sir.

×-*Q.* 38. Where is their place of business? *A.* In Philadelphia.

×-*Q.* 39. When you speak about this towing with a line fifty to eighty fathoms long being the most advantageous mode of towing, you do so on the hypothesis that the barge follows directly in the line which has already been taken by the towboat, do you not? *A.* Yes, sir. She might vary a little. She would follow mostly in the wake of the tugboat.

×-*Q.* 40. Suppose they were towing aslant, in any way, in the current; will not the direction taken by the barge necessarily be somewhat changed? *A.* No, sir; not necessarily.

×-*Q.* 41. Will it not probably be changed? *A.* No, sir. If she has got steerage-way she can follow right in the boat's wake.

×-*Q.* 42. Will not the question whether the boat's direction is somewhat changed or not depend upon the relative force of the current and the speed of the towing boat? *A.* No, sir.

×-*Q.* 43. Then you say that although you are towing athwart a current, or around a curve, which amounts to the same thing, with a tow line fifty to eighty fathoms long, if you have steerage-way on it is an entirely indifferent thing whether the current strikes the towboat directly on the bows, or strikes it somewhat on the beam — in other words, whether the towboat heads directly against the current, or whether it takes the current as a diagonal force? *A.* That depends upon where you are and how much current you have got.

×-*Q.* 44. Now, do you think, in your judgment, it makes any difference, in regard to this towing with a tow line fifty to eighty fathoms long, whether you are in the open sea, with plenty of water, or whether you are in a narrow and crooked channel? *A.* You understand that we have different lines to tow with at sea; you understand that, don't you?

×-*Q.* 45. But I understand you to say that generally a tow line of fifty to eighty fathoms is an advantageous length? *A.* Yes, sir, in smooth water.

×-*Q.* 46. Does that apply to a narrow and crooked channel, or to the open sea? *A.* To a narrow and crooked channel.

×-*Q.* 47. You didn't see this accident? *A.* No, sir.

×-*Q.* 48. A hypothetical question has been put to you, to which you have kindly given your answer. Answer this one: Suppose a vessel of the size and speed of the Berkshire, as described, is going down the Providence River, as described, and it sees ahead of it a tow steamer and towed barge, apparently lying near athwart the channel and seeming to take up the whole of it; what then, in your judgment, would be the proper course for the commander of the Berkshire to pursue? *A.* If I thought there was not room I should wait until there was room.

×-*Q.* 49. In case you see it a distance of a quarter of a mile ahead, and you anticipate danger, would not reversing the screw be a natural and a proper way of taking the headway off of the vessel? *A.* Well, yes, sir; of course she has got to reverse her screw.

×-*Q.* 50. How long after this accident was it that you passed fifty feet to the westward of the spars of the barge, when you came up the river? *A.* I don't remember that.

×-*Q.* 51. I mean by that, was it quite near the time of the accident, or some weeks afterward? *A.* Probably four or five days afterwards. I would not say exactly.

×-*Q.* 52. Was that the first time you saw the spars of the barge? *A.* Yes, sir.

×-*Q.* 53. You had not been in the river between the accident and that time?. *A.* No, sir.

×-*Q.* 54. When you descried this, you were coming up the river? *A.* Yes, sir.

×-*Q.* 55. Can you tell us what the tide and the wind were then, when you came up? *A.* Well, it was calm when I came up. If I remember correctly it was an ebb tide.

×-*Q*. 56. How broad is this channel at this place where you saw these spars? *A*. I could not tell you that.

×-*Q*. 57. How many times during the last four years have you been up the Providence River? *A*. Well, I suppose we can average it as once a month.

×-*Q*. 58. Do you tow down as well as up? *A*. Yes, sir.

×-*Q*. 59. You tow the loaded barges in and the empty barges out? *A*. Yes, sir.

DEPOSITION OF ABEL L. HUNTLEY.

Direct Examination by Mr. ROELKER.

PROVIDENCE, Nov. 23, 1894.

Q. 1. What is your business? *A*. I am the captain of a tugboat.

Q. 2. How long have you been captain of a tugboat? *A*. I have been in charge of the tug America since the 10th of last May, but I have been pilot on tugboats for six years, over this same route, in addition to that.

Q. 3. Are you a licensed pilot for the waters of Narragansett Bay and Providence River? *A*. Yes, sir.

Q. 4. During these years that you have been running on tugboats, what harbors along the Atlantic coast have you been in? *A*. Well, in Portland, Me., Portsmouth —

Q. 5. I don't care for all the ports. Generally, all the harbors from Portland down? *A*. Yes, sir; all the harbors, more or less, from Portland to Chesapeake Bay.

Q. 6. Now, what during that time has been the custom about towing barges by tugs on hawsers in the harbors and rivers along the Atlantic coast of the United States? *A*. Well, the custom has been to tow them on from fifty to sixty fathoms of hawser.

Q. 7. How general is the custom of towing on a line? How often is it done? *A*. Well, it is done mostly all the time.

Q. 8. Is there any rule or regulation of the commissioners, or of any other board or authority, that you are aware of, against it? *A*. No, sir; never heard of any.

Q. 9. Have you ever heard, until this case arose, about there being any danger or disadvantage in towing on a hawser over towing alongside? *A.* No, sir.

Q. 10. How frequently during those six years have you been into Providence River, and into the port of Providence? *A.* Well, I couldn't say exactly. Anyway, as often as once in two weeks; sometimes every week.

Q. 11. And has this general custom of towing most all the time on hawsers in this way obtained in Providence River during that time? *A.* Yes, sir.

Q. 12. What are the comparative advantages or disadvantages in towing in a place like Providence River, say from Conanicut Point up — of towing a barge on a hawser and towing it alongside? *A.* Well, one thing, it takes up less room, as you have only got the width of the barge instead of the width of the tug and barge both.

Q. 13. That is, to tow on a line? *A.* Yes, sir; on a hawser.

Q. 14. What other advantages and disadvantages are there? *A.* Another advantage is that you can guide your boat, and your boat is there, and you can steer her straight; and if you want to back her, you can back her straight by hauling your hawser.

Q. 15. Suppose you were hitched alongside and wanted to back, what would be the tendency? *A.* Well, the tendency is to pull the ship's head athwart the channel.

Q. 16. So as to throw the tug athwart the channel? *A.* Yes, sir; if you back long enough.

Q. 17. There is no greater danger, that you are aware of, to the tug or tow or other vessels in towing on a hawser, than in towing alongside? *A.* No, sir.

Q. 18. Is there any difficulty in the barge, with the proper length of tow line, steering along behind the tug in the course which she is taking? *A.* No, sir; with a good man at the wheel that knows his business to steer anywhere.

Q. 19. Now, you are familiar with the channel between this point and Sabin's Point Light, in Providence River? *A.* Yes, sir.

Q. 20. I will ask you what the width of the channel, from your knowledge of it, would be at low water for a vessel drawing fourteen feet six, from a point westward from the red buoy north of Sabin's

Point Light down towards the light in that part of the channel? *A.* As she come around, you mean?

Q. 21. Yes. *A.* I should say not less than fifteen hundred feet.

Q. 22. Do you know the steamer Berkshire of the Merchants & Miners line? *A.* Yes, sir.

Q. 23. Suppose the master of a vessel like the Berkshire, drawing fourteen and a half feet aft and about two hundred and sixty feet long, were proceeding down the bay at full speed, about eight knots, on a fair day, with a smooth sea and light wind and ebb tide; and suppose he should find himself a little to the westward of the centre of the channel at the first black buoy above the Sabin's Point Light, and a clear channel between him and Sabin's Point, and that he should see a towboat towing a barge two hundred and ten feet long on a hawser from ninety to one hundred fathoms long, coming up the bay, just about rounding Sabin's Point Light, close into the light, on the easterly side of the channel; what, in your opinion, would be the proper and prudent and seamanlike course for the master of the Berkshire to pursue? What ought he to do? *A.* Well, what he ought to do, in my opinion, is to blow the tug one whistle and leave him on his port side. He could do that easy enough.

Q. 24. Suppose when he saw the tug and tow they were below the light, as I have stated, and the tug should apparently be heading in a northwesterly direction; would he be justified from that in concluding that the tug was going over on to the west side of the channel and would block the channel? *A.* No, sir.

Q. 25. What ought he to infer, if he knew the waters there? *A.* Well, he ought to infer that he was just going over to make his turn, or he could blow one whistle and compel him to go that side. That is the proper way to do — to blow his whistle and see which side he was going. He isn't supposed to infer anything about it.

Q. 26. Would he be justified in believing that he was going on the west side simply because he saw him there in that way? *A.* No; especially when he blew one whistle, as I understand the tug did.

Q. 27. Well, now, which side of the channel ought the Berkshire to go down? *A.* She ought to go down on the starboard side of the channel going down, *i. e.*, on the west side.

Q. 28. Now, suppose on the same day, and under the same conditions as to weather and tide, the master of a tug one hundred and thirty-five feet in length and drawing fourteen feet, and towing a barge two hundred and ten feet in length which drew nineteen and one half aft and eighteen and one half forward, on a hawser say ninety to one hundred fathoms long, at the rate of five or six miles an hour, both tug and barge being on the easterly side of the channel, should, when a little below Sabin's Point Light, see a steamer or propeller of the dimensions of the Berkshire at or near the black buoy above Sabin's Point, in the centre or westward of the centre of the channel, with a clear channel between them, what, in your opinion, would be the proper and seamanlike course for the master of the tug to pursue? *A.* Well, it would be the same thing — to blow one whistle and leave the steamer on his port side.

Q. 29. Pass it on the right-hand side? *A.* Yes, sir.

Q. 30. Now, suppose the Berkshire, under those conditions that I have named, should give no signal, should hold her speed until she was within one minute of the collision with the barge, and attempt to pass to the eastward. What would be your opinion as to the prudence and good seamanship of the master of the Berkshire in attempting to do that? *A.* Well, I should think there was no prudence in it at all; very foolhardy.

Q. 31. Suppose she should get within a minute of the collision, and should then slow up, and then reverse his engine, being a right-handed propeller, at full speed, what would be the tendency on his own vessel? *A.* There would be a tendency to throw her head to starboard.

Q. 32. Do you think he would do better under those circumstances, to reverse his engine, or to simply slow down and hold his steerage-way, in attempting to pass to the eastward? *A.* I think the best way would have been to slow down with barely steerage-way on her, and make his turn that way, if he was bound to make it that side.

Q. 33. Would it have been easier or more likely to be done by reversing the engine or by not reversing it? *A.* It would be more likely done without.

Q. 34. You have said that it is customary to tow on a hawser line of from fifty fathoms upwards. *A.* Yes, sir.

Q. 35. In going up Providence River? *A.* Yes, sir.

Q. 36. Would it, in your opinion, be safer to tow with a shorter hawser line than that, with a barge carrying seventeen hundred and sixty tons of coal and drawing nineteen feet of water? *A.* No, sir.

Q. 37. Why not? *A.* Because with the barge she has it don't give her any chance to steer. She is right in the quick-water from the propeller all the time.

Q. 38. Then fifty fathoms would be the least distance you would want? *A.* Yes, sir.

Q. 39. Would eighty or ninety fathoms in any way make it more dangerous for themselves or anybody else? *A.* No, sir; it wouldn't make it any more dangerous, only it takes up that much more room, *i. e.*, up and down the channel. That is all. She would steer just as well, and handle herself just as well, on that length of hawser as on a shorter one. In case there was anything crossways of the channel, it would take up that much room.

Q. 40. By a sailing vessel beating across? *A.* Yes.

Cross Examination by Mr. Green.

×-*Q.* 41. When you say that steering with a fifty or sixty fathom hawser in a somewhat crooked water-way gives no inconvenience in letting the barge follow the tug, you assume that the barge behind the tug goes over just the same course that the tug is going over, do you not? *A.* Yes, sir. She can if she is steered.

×-*Q.* 42. Now, suppose that the wind or the tide, or any other force, is thrown slanting across the course of the tug and of the barge, would not that tend to prevent the barge following in the direct course of the tug? *A.* Well, it would depend upon how much current there was.

×-*Q.* 43. But that has its influence, does it not, to be allowed for? *A.* To be allowed for, of course, by the barge.

×-*Q.* 44. Now, is it not a convenience to the tug to have the greatest amount of hawser out which it can let out, to tow with? *A.* Not in a place like that.

×-*Q*. 45. I mean generally. *A*. Whether you are towing in a harbor or sea is what I want to know.

×-*Q*. 46. Well, begin with the sea. *A*. More advantage if you are getting it out to sea to have a long hawser.

×-*Q*. 47. It is more convenient for the tug, isn't it? *A*. Yes, sir; at sea.

×-*Q*. 48. Now, when you shorten up from one hundred, say, to fifty, in going into a harbor, why do you shorten it? *A*. We shorten it so we won't take up so much room to sailing vessels beating across the channel.

×-*Q*. 49. But what difference does it make in case uniformly the barge follows after the tug in the course already taken by the tug? *A*. Well, the difference it makes, she takes up more room, and vessels beating across the channel have to have more room to get by her.

×-*Q*. 50. As a matter of fact, you do find in practice that it is expedient, in getting into the narrower and crookeder channels, to shorten up from ninety or one hundred to fifty or sixty fathoms? *A*. Yes, sir.

×-*Q*. 51. Now, a hypothetical question has been put to you in regard to the position of the Berkshire, or the position of a vessel like the Berkshire, and the position of a tug like this one. Suppose a vessel of the size of the Berkshire, going down stream pretty nearly in the centre of the channel or a little to the east of it, at a speed of say eight miles an hour, finds rounding a curve in front of it a tug with a hawser fifty or sixty fathoms, and a barge such as has been described to you; and suppose the position, as seen from the Berkshire, of the tug, hawser and barge is such that apparently it stretches across and takes up the whole channel; would it or would it not, in your judgment, be good seamanship for a steamer like the Berkshire to reduce its headway or to stop and wait for developments? *A*. Well, it would be advisable for him in that case to blow his whistle and reduce his way — reduce his speed and blow his whistle. That is what the law says, when it comes to that. That is a law of the steamboat inspection service.

×-*Q*. 52. Well, the hypothesis was that the distance between the steamer and this towed barge, when the Berkshire saw her apparently taking up the whole channel, was a quarter of a mile or so. Is it bad seamanship to reverse to take speed out under those circumstances? *A.* Well, a quarter of a mile distant there was no necessity of reversing.

×-*Q.* 53. Now kindly answer my question. *A.* That is as near as I can answer it.

×-*Q.* 54. My question was this: If a large steamer like the Berkshire, going down a little to the east of the center of the channel, but substantially in the middle of the channel — *A.* The way I understood it was that she was to the westward of the channel.

×-*Q.* 55. I don't care about that. We are simply putting to you hypothetical questions. Mr. Roelker has put to you a question assuming certain things which you are to know nothing about. Now I am putting such a question to you, you knowing nothing about the facts. [×-*Q.* 51 *of preceding page, and the question following, read to witness.*] *A.* Well, my idea is that it would be the proper thing for him to reduce his speed and blow his whistle, the side that he intended to go on. That is what I should do.

×-*Q.* 56. Now, in those circumstances, the nearness of the steamer like the Berkshire to this tow in front of it being as described, would it not be a proper thing to reverse the engine of the steamer? *A.* No, sir; I don't think so.

×-*Q.* 57. You think, then, the steamer should depend on her headway — *A.* On her steerage-way, so as to just have barely steerage-way.

×-*Q.* 58. Now, in your judgment, how long would it take for a steamer going eight miles an hour to reduce its speed to barely steerage-way, the wheel not being reversed? *A.* Well, it wouldn't take very long.

×-*Q.* 59. Can't you give it to me in minutes or seconds? *A.* No, I can't; because I am not familiar with a steamer like the Berkshire.

×-*Q.* 60. Then you don't know whether between the position of the Berkshire and the position of the approaching tug there would or would not be a sufficient distance to reduce the steamer's eight knots and slow her down to mere steerage-way before they touched? *A.* Well, by stopping her engine without reversing it, she would have lost her headway in a very short way, *i. e.*, at the rate of speed that she was going.

×-*Q*. 61. In how long a time? *A*. Well, I should think a minute and a half.

×-*Q*. 62. At eight miles an hour she was going a mile in a little over seven minutes, wasn't she? *A*. Yes, sir.

×-*Q*. 63. And the hypothetical question called for a distance between them of a quarter of a mile. In whose employ are you? *A*. Thames Towboat Co.

×-*Q*. 64. Where is that? In what State? *A*. New London, Ct.

×-*Q*. 65. That is your home — New London? *A*. Yes, sir.

×-*Q*. 66. Are you familiar at all with the practice of towing barges up this river, the towing tug being lashed alongside? *A*. Well, I have done it, and I have done it both ways.

×-*Q*. 67. Now, under what circumstances do you lash alongside? *A*. Well, many times we lash them alongside because we have got to dock them, and got to pick them up anyway to dock, and they might as well be picked up one time as another.

×-*Q*. 68. At what part of the bay would you lash alongside? *A*. Sometimes way down towards Bristol; sometimes clear up to Field's Point; depending on the time that we have, and everything.

×-*Q*. 69. Well, you lash alongside for the purpose of docking, the position of the tug alongside giving you a greater control over the movements of the barge than you otherwise would have, don't it? *A*. No; it don't give us any more influence over the barge in that way, only as we get to the dock we can put her into the dock and stop her right there.

×-*Q*. 70. In other words, you can more immediately control the movements of the towed barge? *A*. You can't control her in certain cases going up the bay so quick as you can on a hawser.

×-*Q*. 71. Very kindly state to me what those cases are. *A*. In case you want to make a sharp turn, you can make it quicker with the barge on a hawser, because you can turn your boat quicker, and you can turn the barge and boat too. Two of them together wouldn't steer so well.

×-*Q*. 72. You can pull the bows with a hawser more quickly than when they are lashed together? *A*. Yes, sir; that is the idea.

Direct Examination resumed by Mr. Roelker.

Q. 73. With a smooth sea, Captain, little or no wind, and an ordinary summer ebb tide, running as it runs down near Sabin's Point, would there be any difficulty in steering a barge along behind a tug? *A*. No, sir; I don't think so.

Q. 74. Either across the channel or any other way? *A*. No, sir. Ought not to be if the man there understands steering at all.

DEPOSITION OF JOHN D. BECKWITH.

Direct Examination by Mr. Roelker.

Providence, Jan. 22, 1895.

Q. 1. Please give your name, age, residence and occupation. *A*. John D. Beckwith; sixty-two years old; residence, New Haven, Ct.; my business is steamboating — towboating.

Q. 2. How long have you been engaged in running vessels, and where? *A*. I have been over thirty-five years since I commenced to go in a vessel, and running right through Long Island Sound from New York to Providence and New Bedford, occasionally to Boston. For the last fifteen years I have been in the towing business.

Q. 3. As master? *A*. Well, I have been master about seven years, and the rest of the time I have been pilot previous to that.

Q. 4. You are a licensed pilot for these waters, and have been for how many years? *A*. I have got my sixteenth master pilot's license.

Q. 5. How often have you been coming into Providence River and up to Providence since you have had those licenses as pilot? *A*. Well, I have averaged to come here with tows, I suppose, probably forty trips a year; some years not as much as that, and some years a little more than that.

Q. 6. I will ask you what the custom is with reference to towing barges behind a tug, on a tow line, in Providence River up to the port of Providence? *A*. That is a universal practice.

Q. 7. How long has it been so? *A.* Ever since I have been in the business.

Q. 8. How often is it done? *A.* Done every day in the week.

Q. 9. Is there any rule, regulation or custom or opinion against it, that you ever heard of? *A.* I never have heard of any.

Q. 10. Has it ever been claimed by anybody to you that it was more dangerous than towing alongside? *A.* I never heard it advocated, not to any extent; no, sir.

Q. 11. In your opinion, which is the safer method of towing? *A.* Well, I think it is the safest to tow them up on a hawser.

Q. 12. Will you give your reasons for this opinion? *A.* You take them on a hawser, and you can come along as easy as you are amind to, just keep steerage-way on your barge so that they can steer and follow the boat, and there is only the width of one barge to keep clear of, if you meet anything. If you have got them doubled up, three or four perhaps, or more or less, as the case may be, they take up that much more width of the channel.

Q. 13. Is there any comparative difference in the easiness of controlling them? *A.* Well, you can handle a tow a good deal easier on a hawser than you can alongside.

Q. 14. Is there any difficulty in the barge towing along in the wake of the tug? *A.* No, sir.

Q. 15. You are familiar with the barge N. & W. 4 that was sunk, belonging to the Norfolk Line? *A.* Yes, sir.

Q. 16. And the towboat N. & W. 1? *A.* Yes, sir.

Q. 17. And also with the steamer Berkshire? *A.* Yes, sir.

Q. 18. Supposing that barge to have a cargo of about eighteen hundred tons of coal on board, and the towboat N. & W. 1 to have her in tow, what would be the shortest tow line that you would consider safe for use up into Providence River past Sabin's Point Light? *A.* If I was going to tow that barge up here, I wouldn't tow her up here on any less than fifty fathoms of hawser.

Q. 19. Why not? *A.* For the simple reason that if you get her up too close you get her into the boat's quick-water, and the quick-water will throw her back and forth and she won't steer so well. You give her the length of the hawser so she will be back of the quick-water, and she will follow straight.

Q. 20. Suppose the length of the hawser was increased to eighty or ninety fathoms, would that increase the risk to the towboat or tow or to other vessels, in your opinion? *A*. No, sir; I don't think it would.

Q. 21. Supposing the Berkshire to be coming down the river on a pleasant afternoon, and when about opposite the black buoy No. 7, above Sabin's Point Light, she should exchange whistles with the Bay Queen of the Continental Line— exchange one whistle each, and pass the Bay Queen port to port; and suppose when they did that, that the Berkshire should be on the westward, pretty near the center of the channel, and that she should then have a clear channel down to Sabin's Point, and that he should see the barge N. & W. 4 in tow of the towboat N. W. 1, with apparently ninety to one hundred fathoms of line out, below Sabin's Point Light, and apparently headed to the westward across the channel; would the master of the vessel be justified in believing that the towboat was going over on to the westside of the channel? [*Objected to as leading; and the witness being asked his opinion as to another man's opinion, and not his own opinion on a definite statement of facts or a hypothetical statement.*] *A*. I don't think he would be justified in thinking so.

Q. 22. What would be the proper and natural inference for one to draw, who is familiar with those waters? *A*. I should naturally suppose that as soon as he got up and turned Sabin's Point, he would swing right off northeast up the channel.

Q. 23. And keep on which side of the channel? *A*. And keep to the right.

Q. 24. Keep on the right-hand side of the channel — on the east side of the channel? *A*. Yes, sir; that would be the eastern side of it.

Q. 25. What would be the duty, as you understand it, of the captain of the towboat? *A*. To have blown him one whistle, and as soon as his barge was clear to turn off northeast.

Q. 26. And what, under those circumstances, would be the duty of the Berkshire? *A*. To have answered him one whistle, and stopped his ship until he could have turned him.

Q. 27. And kept on which side of the channel? *A*. Kept to the right.

Q. 28. On the west side of the channel? *A*. On the western side of the channel.

Q. 29. You say you have been running here for thirty-five years, and have been a pilot for fifteen. What is the width of the channel, for vessels of the draught of the Berkshire, in the vicinity of Sabin's Point Light and to the westward of there? *A*. What is the Berkshire's draught?

Q. 30. About fifteen feet, I think it was, — 14.6. *A*. Well, between Sabin's Point and Pawtuxet beacon, I should say that that distance across there was about a quarter of a mile, *i. e.*, a quarter of a nautical mile, I mean, which would be about fifteen hundred feet or a little over.

Q. 31. If the captain, then, of the Berkshire thought that the width of the channel at those points was only three hundred feet, was he right or wrong? *A*. It is a good deal more than three hundred feet wide there. I should say he was wrong, most assuredly.

Q. 32. Do you know anything about any bight in the channel in that vicinity, below that buoy No. 7? *A*. After you get below buoy No. 7 there is a big bight makes in towards the Pawtuxet club house there.

Q. 33. Deep water? *A*. Yes; good water in there.

Q. 34. So that if the captain of the Berkshire had sailed down as you suggest, and kept to the right, he would have had ample room to pass to the westward in that bight, would he? *A*. Yes, sir.

Q. 35. Did you see the barge N. & W. 4 after she was sunk? *A*. I did; yes, sir.

Q. 36. How much of the channel was there to the westward of where she was sunk, as you saw her as she laid there — what proportionate part? *A*. About five eighths of the channel.

Q. 37. Then she was considerably to the eastward of the centre of the channel, as she lay there on the bottom, was she? *A*. She was, according to my judgment and what I remember of it.

Q. 38. Suppose that the captain of the towboat, when below Sabin's Point, had blown one whistle to the Berkshire, had slowed down his speed and had continued about as close as he could to the easterly side of the channel, and as soon as he had rounded the Point had turned off to the northeast, would he or not, in your opinion, have done his duty in the premises? *A.* That was what was right and proper for him to do.

Q. 39. Suppose that the Berkshire had not answered his signal, but had undertaken to pass between him and the easterly side of the channel; under those circumstances, I understand you to say that you think the captain would have disregarded his duty? *A.* I think he would have laid himself liable.

Q. 40. Suppose that, having started to do this, when he got within one minute run of a collision with the barge, the towboat having sheered out of his way and narrowly escaped a collision, that he should first stop his engines and then reverse them; would that or not, in your opinion, have been good seamanship? *A.* Well, in the cramped position that he was in, then it was too late; because when he come to cut back on her, a propeller will back her stern to port and her head will fall off to starboard; and that was most assuredly going to throw his head off at right angles with the barge.

Q. 41. Would that be likely to have increased the chances of a collision or decreased it? *A.* The effect of that was to increase it.

Q. 42. What, in your judgment, should she have done at that time? *A.* He should have kept her going and with the wheel hard to starboard, and kept crowding her towards the bank, so that if he hit her at all it would have struck her a very glancing blow.

Cross Examination by Mr. Green.

×-*Q.* 43. You stated, Captain, that you never had, to any extent, heard side-towing advocated. I want to know if you ever heard any objections to this stern towing on the part of captains and pilots of the river steamers? *A.* Well, since this collision I have heard some little talk about it, but I never heard anything before that.

×-*Q.* 44. I also understood you to say that you should want fifty fathoms of hawser, and you didn't think that eighty or ninety increased the risk. I understand you to mean by that that the length of the hawser is comparatively indifferent? *A.* Yes, sir.

×-*Q*. 45. That is, don't make any difference whether you have fifty or one hundred? *A*. Not as far as towing along is concerned.

×-*Q*. 46. Now, does it have any effect on the boat which is being towed, keeping in its place behind the towing boat, if there is a tide which runs diagonally to the course of the tow? *A*. Well, a diagonal tide will set the boat off just as fast as it sets the barge off.

×-*Q*. 47. Suppose one is eighty or ninety fathoms, or even fifty fathoms, behind the other, would it not set them off at different angles if they are both going around a curve? *A*. Well, the boat will strike the tide first, and she will be the first to cut off; and when the barge gets into that tide she will cut off and make the same turn as the boat did.

×-*Q*. 48. Is or not a tow which is lashed alongside under the more immediate control of the towing boat than one which is fifty or one hundred fathoms behind it? *A*. Well, I think they are just as much under control, if a man is going along easy, — just as much under control on a hawser as they are alongside.

×-*Q*. 49. Now, suppose a large steamer is going down the river, and at Sabin's Point sees coming around the curve in front of it a tugboat and tow which apparently takes up the whole channel; suppose the steamer is about the middle of the channel; did I understand you correctly when you said that under those circumstances it would be good seamanship for the steamer to slow up or stop? *A*. Before he got down to him; yes, sir.

×-*Q*. 50. When he first saw him? *A*. Yes, sir; to have given him a chance to have made the turn.

×-*Q*. 51. You have spoken of this channel being fifteen hundred feet wide there. That fifteen hundred feet width includes what depth of water? Do I correctly understand you as meaning that the fifteen hundred feet there means a clear depth of water of fifteen or sixteen hundred feet of water? *A*. Yes, sir.

LIBELLANT'S (M. & M. T. CO'S) EXHIBITS.

EXHIBITS A, F. H.

[PUT IN EVIDENCE, PAGE 54.]

ABSTRACT FROM ENGINEER'S LOG, STEAMSHIP BERKSHIRE.

WEDNESDAY, Aug. 16, 1893.

Commences with cloudy weather, and moderate Easterly wind. Left Prov. for Norfolk, at 2.40 P. M. Reg'r. 000.

Draft of water, F. 11′.05″. A. 14′.08″ mean 13′.0½″ full sp. at 2.52, at 3.02, slowed, stopped and backed engines full speed. Ship came in collision with N. & W. Coal Barge, No. 4. Coal Barge sunk. Stopped Engines at 3.05, bk sl. 3.06. st. & ahsl. 3.07, st. 3.08, bk sl. 3.15, st. & ahsl. 3.16, st. & ahsl. 3.18, st. & bk sl. 3.19, st. & bk sl. 3.20. st. & ahsl. 3.21, st. and bk sl. 3.23. st. & ahsl. 3.25. st. & ahsl. 3.26, st. & ahsp. 3.27, st. & ahsl. 3.47, arrived in Prov. at 3.55. Reg'r. 3155. Ship came back to Prov. to repair Damage caused by Collision with Coal Barge.

The damage consists of two holes in Port Bow, one hole about 6′ 10″ long at near 20 foot mark, and one hole, about 6″ x 6″ between 14 & 15 foot marks, this hole is irregular in shape.

Temporary repairs effected, and ship ready to sail at 7.15, Thursday morning, Aug. 17.

J. W. PRATT,
Engineer S. S. Berkshire.

The N. & W. Coal Barge was in Tow of N. & W. Tow Boat No. 1.

EXHIBIT A., PRENTISS O. HOOPER.

[PUT IN EVIDENCE, PAGE 118.]

PROVIDENCE, Aug. 22, 1893.

This will certify that I have this day been called by Mr. J. W. McCloskey, agent at Providence, for the Providence and Norfolk line of steamships, to hold survey on steamship Berkshire in regard to further temporary repairs to the breaks in her bow caused by collision with a barge on her previous trip to Providence. I therefore repaired aboard the said steamship Berkshire, and found the temporary patches which had been put on for the last voyage removed that heavier ones may be put on in their places, that the ship may continue in her regular trips until the 1st of October. I therefore recommend that the small hole in the bow as described in my report of August 16, be covered with iron plate 22′ x 14′ x $\frac{3}{8}$ of an inch, with rubber fold between, fastened with $\frac{3}{4}$ inch screw bolts with screw nuts on the inside 3 to 4 inches below; also the large hole to be covered with iron plates 7 ft. 4 in. x 2 ft., and $\frac{1}{4}$ inch thick, with rubber fold between and fastened as above with same size bolts and nuts well set in and screwed up on the inside.

EXHIBIT B., PRENTISS O. HOOPER.

[PUT IN EVIDENCE, PAGE 118.]

PROVIDENCE, Aug. 23, 1893.

I again visited steamship Berkshire and found the above-mentioned repairs have been fully and completely done, and in my opinion the said steamship Berkshire is now perfectly seaworthy and fit to perform her regular trips from now until say Oct. 1, 1893, when she is to be put on dock for permanent repairs and inspection.

P. O. HOOPER,
Port Warden.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1895.

No. 160.

THE STEAM TOWBOAT NO. 1, NORFOLK AND WESTERN.

MERCHANTS AND MINERS TRANSPORTATION COMPANY,
LIBELLANT, APPELLANT.
v.
NORFOLK AND WESTERN RAILROAD COMPANY,
CLAIMANT, APPELLEE.

No. 161.

THE BERKSHIRE.

MERCHANTS AND MINERS TRANSPORTATION COMPANY,
CLAIMANT, APPELLANT.
v.
NORFOLK AND WESTERN RAILROAD COMPANY ET AL.,
LIBELLANTS, APPELLEES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

BEFORE COLT, PUTNAM AND NELSON, JJ.

OPINION OF THE COURT.

JUNE 23, 1896.

PUTNAM, J. This collision occurred August 16, 1893, in the early afternoon, in the narrow channel of the Providence River at Sabin's Point, between the steamer Berkshire, descending the river, and a barge in tow of a tug, ascending the river, the tug being known as N. & W. 1, and the tow as Barge N. & W. 4. The barge was loaded with coal, and was sunk. The channel was largely a dredged one, and off Sabin's Point was five hundred or six hundred feet wide, but above there only three hundred or four hundred feet. Ascending the river, that part of the channel with which this case is concerned bore northerly — north three-fourths west — below Sabin's Point, and above it still northerly, but with a trend of quite four points easterly. To the easterly of the channel, at and near Sabin's Point, was a sheet of shallow water, so the approaching vessels concerned were seasonably and continuously visible for a sufficient time for safety of movement on the part of each of them.

There are two libels, one in behalf of the Berkshire against the tug, and one against the Berkshire. That against the Berkshire is joint, in behalf of the owners of the barge and of the cargo aboard. The proofs in the District Court were taken by depositions. It is, therefore, claimed by the Berkshire that the decision of the learned judge of that court does not have so much weight as if he had seen the witnesses.

The Berkshire was 2,014 tons register, and the barge was of 1,063.69 tons, and was loaded with 1,716 tons of coal. The Berkshire drew 14 feet, 6 inches, forward, and 11 feet, 10 inches, aft; she was equipped with a right-hand propeller, and always at full speed astern, backed aport, no matter how the wheel was put. Her full speed was 11½ knots. The barge drew 18 feet, 6 inches. The entire length of the tow on the theory of the Berkshire was as follows: tug, 135 feet, barge, 210 feet, hawser, 600 feet; total, 945 feet. On the theory of the tug it was as follows: tug, 135 feet, barge, 210 feet, hawser, 300 feet; total, 645.

There are two appeals, and each taken in behalf of the Berkshire. In the case on the libel filed by the owners of the Berkshire the assignment of errors alleges two faults only, namely:

1. A narrow channel, with an unjustifiably long tow line.
2. The tug and tow were across the narrow channel, so as to block it.

The first was the only fault alleged in the libel filed by the owners of the Berkshire.

On the libel against the Berkshire the assignment is the same as the other, adding also:

3. The barge was in fault in not proceeding right behind the tug.
4. The barge was in fault in not putting her helm to the starboard sooner.

The record, however, does not require us to give these special attention.

The libel in behalf of the Berkshire alleges that the Berkshire passed the towboat, "keeping it on the starboard", but it does not state how she came to have the tug on her starboard, nor where the tug was when first sighted. The answer to the libel against the Berkshire ~~denies that the Berkshire heard any whistle from the tug, and~~ says she discovered the tug, with the barge in tow, "on the starboard side of the channel, and on her starboard bow", that the tug was heading towards the western side of the channel, that the Berkshire put her helm to starboard, and, soon after, reversed, that she had come to a stand at the time of the collision, and that the tug was proceeding about six miles an hour; and it charges against the tug faults as in the assignment of errors referred to.

The master of the Berkshire testifies that she was running through the water about eight knots when he first saw the tug, that this was about five minutes before the collision, that the Berkshire was then right in the middle of the channel, that he could not go to starboard as the tug was across the channel, that he gave an order to starboard, and afterwards hard-a-starboard and full speed astern, that these last orders were a little over a minute before the collision, that he had not before this given any order to slow or reverse, and that the collision was on the eastern side of the channel; and he admits an ebb tide of two or three knots. This makes the Berkshire's speed over the ground, by her own admission, between ten and eleven knots.

He further testifies that if he had "stopped" or "backed" he would have thrown his ship "out of her course." He does not state specifically whether he could have slowed. He says in the same connection the steamer Petrel was coming up behind him, but he does not know how far astern. The following occurs on his cross-examination:

"Q. When you first saw her, you have marked upon the chart, she was clear across the channel? A. I came round Ponham and saw the tug, and then came the Bay Queen; she gave me one whistle and I answered it, and I ported. Then I looked at the tug and thought to myself, the tug is going to make a turn, and then I just kept to the eastward.

Q. You saw that she was not going to make a turn? A. I saw there was no room for me to pass. A tug going round a point like that has got to proceed some distance in order to get her tow round.

Q. You saw that this tug had a long hawser when you first noticed her, you say? A. Yes, sir.

Q. Then the longer the hawser, the longer the distance she would have to go over to the westward before she could turn up stream again in order to make her barge clear the Sabin's Point Light, judging from your observation? A. She would have to swing over that way.

Q. You knew that she would have to swing over that way; then why didn't you slow down until she got past? A. I thought there was room enough to go to the eastward.

Q. Then if you hadn't thought there was room enough to go to the eastward, you would have slowed down? A. Yes, sir.

Q. When did you first find out that you could not get by her? A. When I got up to Sabin's.

Q. Do you mean that you were a quarter of a mile off at the time? A. A quarter of a mile. When I found that I could not get by."

Fairly construed this means that he could have slowed down, and also that the tug had not in fact crossed to the westward, but merely that he thought she was going to do so.

The Berkshire was plainly in fault in two particulars: she was moving too fast in that narrow channel, with many vessels about, and this tug with her long tow approaching; and Revised Statutes, sec. 4233, Rule twenty-one required her at least to "slacken her speed" under the circumstances, which she did not do seasonably.

In *The Josephine B.*, 58 Fed. Rep. 813, the Circuit Court of Appeals for the Second Circuit held a steamer in fault under circumstance which, in all essential particulars, were singularly like those of the Berkshire.

We will next consider the alleged faults of the tug. In her answer to the libel in behalf of the Berkshire, the tug says she was coming up on the east side of the channel, that the Berkshire was first sighted on the west side or middle of the channel, ~~that the tug signalled with one blast and ported, but got no reply,~~ that, after the collision, the Berkshire passed astern of the barge, and on her west side, up the channel to Providence, showing that there was room enough for the Berkshire to have passed out on that side. The allegations of her libel are substantially the same. We have referred to the only fault alleged against her in the Berkshire's libel, which was in the following language:

> "That the said collision and damage was due to and caused by the carelessness and bad management of the said tug in towing said barge with a long hawser through the narrow channel, instead of being lashed alongside said barge, or of using a short hawser for towing."

The faults alleged in her answer to the libel in behalf of the tug, which answer was filed somewhat later than the libel against the tug, are as follows:

"1. In proceeding up a narrow channel with such a long tow line.

2. In proceeding across a narrow channel in such a way as to block the channel, when they should have kept right up the channel.

3. In the barge not proceeding directly after the tugboat.

4. In the barge not putting her helm to starboard.

5. In not keeping clear of the said steamship Berkshire as required by law, and other faults to be shown at the trial of said cause."

The tug alleges and offers proof that she gave a signal of one whistle and got no reply. It may be that she was, therefore, in fault, under the Supervising Inspectors' Rule III, approved February 19, 1892, and having the force of law — *Belden* v. *Chase*, 150 U. S. 674, 698; *The Delaware*, 161 U. S. 459, 467, — for not promptly giving the danger signal and stopping, which she could perhaps have done without danger to her tow, as she was running against the tide. *The Galatea*, 92 U. S. 439, 446. But neither the pleadings nor the assignments of errors raise this question, so we cannot with justice give it consideration. The same is true as to the proposition urged upon us that the tug should have stopped because she was heading against the current; although this rule was especially applied to like circumstances in *The Talabot*, 15 P. D. 194, a well considered case, which, availing here, would perhaps hold that the tug, before making the turn, was bound to wait for the Berkshire to pass, and this independently of any local usage.

It is to be noticed that neither the Berkshire's libel nor her answer directly charges as a fault the mere matter of towing on a hawser, but only its length. This has relation to her proofs that it was about one hundred fathoms long. On the other hand, the tug claims that it was of a length customary in such inland waters, and in that very locality, that is, about fifty fathoms. Baker, the master of the tug, testifies in detail and directly that, before entering the river and while off Bristol, the hawser was shortened from its sea-towing length to fifty fathoms. The other witnesses aboard the tug and barge confirm this. Evidence of witnesses who took actual part in this act must prevail over the mere estimates of lookers-on.

The Berkshire produces ~~much evidence~~ many opinions that the make-up of the tow in this respect was faulty, but it is mainly based on the hypothesis of a hawser one hundred fathoms in length. Independently of this, it is beyond the province of the courts to condemn a practice so notorious, and so long continued, that it must be presumed to be known to Congress, and to the Supervising Inspectors, and yet has not been condemned by either of them. We must regard the usages of navigation — *The Galatea*, 92 U. S. 439, 446 — and we do not know that we would be authorized to condemn as unsafe the ~~navigation~~ us of this narrow channel by a tug with its tow, on a hawser of customary length, more than ~~its navigation~~ by a propeller so large and of such draft and speed as the Berkshire, whose master admits that she ~~always~~ backed aport, as already stated, and could not safely stop and reverse, all which means that she was in danger of "smelling" the ground and failing to ~~throw~~ answer her helm. *The Ralph Creyke*, 6 Asp. N. S. 19 Marsden's Collisions at Sea, 3rd ed., 515.

On the whole, we adopt the language of the Circuit Court of Appeals in *Josephine B.*, 58 Fed. Rep. 813, 816, a case we have already cited. One question there was as to the fault of a tug in taking a tow through Hell Gate, on a line of two hundred and fifty feet. The court said:

"Such a method of navigation seems unwise; but not only is there evidence that it is quite common, when a tug has a single large schooner in tow, but some of the experts testify that such is the safer course, and that the other method would render control of the tug more precarious, while not increasing materially her control of the tow. We concur with the district judge in the conclusion that the conflict between the experts is so great that, in the absence of any special regulations on the subject, the party holding the affirmative of the question has not shown towing on a hawser to be a fault, by a fair preponderance of proof."

Spooner, the master of the steamer Bay Queen, testifies in behalf of the Berkshire, as follows:

"Q. That afternoon when you were going up towards Providence, were you ahead or astern of this tug and barge? A. Ahead of her.

Q. Did you see the tow line which connected the two? A. Yes, sir; I seen it.

Q. What was the length of it? A. I should think it was over two hundred feet.

Q. How is the channel in that place where this collision took place? A. It is a very bad and narrow place to get a steamer round, or a tow especially. I think it is the worst place we have there in the Bay.

Q. When, therefore, you say that the tug and tow took up the whole channel, you don't know actually whether they did so or not? A. I know that with that length of tow line they could not get round the Point without taking up the whole channel. It takes up the whole channel when they come up there with a long line. I have seen lots of them before."

If, therefore, the contingencies were as stated by this witness, we can only determine that we cannot condemn the tug merely because the tow was made up as it was, and that the pilot of the Berkshire was bound, when he sighted the tug and tow, to foresee the possibility of difficulties, and to immediately take the degree of precaution necessary when, either on land or at sea, vehicles or vessels are approaching to pass each other under extraordinary circumstances. *The Alleghany*, 9 Wall. 522, and *The Syracuse*, do. 672, apply directly to circumstances like these at bar. We cite again *The Galatea* at page 446:

> "Beyond doubt, the navigation through that gate is quite dangerous; and yet the evidence tends pretty strongly to show that both vessels, if proper precautions had been used, might have passed each other in safety, and without danger of collision."

Aside from this, did the tug head to cross to the western bank of the channel, as claimed by the Berkshire? It must be admitted that, especially in a channel so narrow, each pilot was bound, with peculiar exceptions not applicable here, to keep well over to the side on his starboard hand: and the fact that the bends in the channel might at times bring one on the starboard of the other does not affect this rule. *The John S. Hasbrouck*, 93 U. S. 405, 407; *The Galatea*, 92 U. S. 439, 442; Marsden's Collisions at Sea, 3rd ed., 344, 427, 466, 468, 513; *The Velocity*, ~~Law Rep.~~ 3 P. D. 44; *The Ranger* and *The Cologne*, ~~Law Rep.~~ 4 P. D. 519.

This rule is recognized as sound by Art. 21 of the International Regulations of 1885. It must also be said that, even if, on account of the state of the pleadings and of the issues actually tried in the District Court, the special rules to which we have referred as *prima facie* governing the tug are not directly in question here, the narrowness of the river, coupled with the bend, demanded of the tow, made up as this was, very great precaution, and prohibited it from laying across the channel, when it might have stopped as required in *The Talabot, ubi supra,* and *The Galatea, ubi supra,* until the Berkshire had gone clear. Therefore, as she did not take the special precautions referred to, we must hold the tug in fault, if it be shown she did not keep herself and her tow to the easterly side of the centre of the channel.

Hooper, the master of the Berkshire, testifies that, as he was passing the steamer Bay Queen, shortly before the collision, the tug was about crossing his bow, that the tug was steering "north east, or north north east", and the barge "about north". These courses agree with those given by the tug. He says "he had taken up the whole of the channel". This probably means the tug and tow. Keine, the Berkshire's quartermaster, sustains her master, and says that, when he got the first order to starboard, the tug was on his starboard bow, and the barge on his port bow; but he says he "gave no particular attention".

Our attention has not been called to the evidence of any other person aboard the Berkshire whose duty it was to maintain a lookout.

Miller, a witness for the Berkshire, a deckhand aboard the Petrel, 22 years old, said "the barge" "had it all", meaning the whole channel. An examination of his testimony shows it of no value. The same as to Nevil, ashore, waiting to go clamming, who used about the same expression. Cornwell, another witness for the Berkshire, also waiting to go clam-digging, testifies that the barge and tug were well on the east side of the channel at the time of the collision, and again that the tug was heading in a "north west" direction, which would bring her partly across the channel. His testimony weighs on the whole for the tug, but it is of little value. Our attention is not called to any other proofs in favor of the Berkshire on this point.

On the other hand, we find in the Berkshire's own case the following: First, her earliest statement of the case, which is in her libel, complains only of the length of the tow-line, and makes no complaint that the tug and tow had in fact taken the channel. Second, Captain Hooper's cross-examination, already referred to, shows rather an apprehension that the tug would cross the channel than the fact that she had done so.

On the other hand, Captain Baker, of the tug, testifies positively that the tug and barge kept well on the easterly side of the channel. Captain Burnett, of the barge, testifies the same. These witnesses appear fair and are not weakened on cross-examination. Many other witnesses are to the same effect.

The Berkshire makes a point that the Berkshire ~~tug~~ was at all times on the starboard bow of the tug ~~Berkshire~~. This is admitted by Baker and Burnett. From the nature of the bend in the river, this would be so, until the tug was well around it. It is plain from the admitted place of collision that the tug had not fully accomplished the turn when it occurred. For the same reason, the tug had not got on a course of several points to the eastward of north, but was on one of only about one point to the eastward, when the collision occurred, as is claimed by the Berkshire and admitted by the tug. As the tug and tow were making the bend, the barge would inevitably head a little more northerly than the tug. Therefore, we see nothing in these facts to affect the general aspect of the case, for reasons already given as applicable to bends in narrow channels.

On the whole, the Berkshire fails to maintain the burden of proving that either the tug or her tow was on the westerly side of the channel, or in fault as put in issue.

In No. 160, The Steam Tow Boat No. 1, the decree of the District Court is affirmed, with the costs of this court for the appellee.

In No. 161, The Berkshire, the decree of the District Court is affirmed with interest, with the costs of this court for the appellees.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1895.

No. 160.

THE STEAM TOWBOAT NO. 1, NORFOLK & WESTERN.

No. 161.

THE BERKSHIRE.

DECREE.

JUNE 23, 1896.

These causes came on to be heard April 9, 1896, upon the transcripts of the records of the District Court of the United States for the District of Rhode Island, filed December 18, 1895, the agreement as to proofs, filed December 18, 1895, and the proofs filed therewith, and were argued by counsel.

On consideration whereof, It is now, to wit, June 23, 1896, ordered, judged and decreed, as follows:

In No. 160, The Steam Towboat No. 1, the decree of the District Court is affirmed with the costs of this court for the appellee.

In No. 161, The Berkshire, the decree of the District Court is affirmed with interest, with the costs of this court for the appellees.

By the Court,

JOHN G. STETSON, *Clerk.*

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

I, John G. Stetson, clerk of the United States Circuit Court of Appeals for the First Circuit, certify that printed pages numbered 1 to 317, inclusive, hereto prefixed, contain and are true copies of transcripts of records of the District Court of the United States for the District of Rhode Island, the agreement as to proofs and the proofs referred to in said agreement, the same being the entire record upon which the causes entitled, as follows:

No. 160.

THE STEAM TOWBOAT NO. 1, NORFOLK AND WESTERN.

MERCHANTS AND MINERS TRANSPORTATION COMPANY,
LIBELLANT, APPELLANT,
v.
NORFOLK AND WESTERN RAILROAD COMPANY,
CLAIMANT, APPELLANT.

No. 161.

THE BERKSHIRE.

MERCHANTS AND MINERS TRANSPORTATION COMPANY,
CLAIMANT, APPELLANT,
v.
NORFOLK AND WESTERN RAILROAD COMPANY ET AL.,
LIBELLANTS, APPELLEES.

were lately heard and decided in said Circuit Court of Appeals.

I further certify that printed pages numbered 319 to 331, inclusive, hereto prefixed, contain and are true copies of the opinion of said Circuit Court of Appeals announced June 23, 1896, and of the decree of said court entered in accordance therewith.

I further certify that said transcripts of records, and other papers named above, remain on file and of record in said causes in said United States Circuit Court of Appeals for the First Circuit, and that said pages above named, containing true copies thereof, contain and are a true copy of the records and all proceedings in said causes, in said United States Circuit Court of Appeals, to and including Sept. 30, 1896, and that the issuing of the mandates in said causes upon said final decree of June 23, 1896, has been stayed till the further order of Court.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this thirtieth day of September, 1896.

[SEAL]

John G. Stetson,

Clerk.

164-707

164-707

Office Supreme Court, U. S.
FILED.
OCT 17 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

THE STEAM TOWBOAT "No. 1, NORFOLK & WESTERN"

THE MERCHANTS AND MINERS TRANSPORTATION COMPANY,
Libellant, Appellant,

629 & 630.

v.

NORFOLK AND WESTERN RAILROAD CO.,
Claimant, Appellee.

THE STEAMSHIP "BERKSHIRE."

THE MERCHANTS AND MINERS TRANSPORTATION COMPANY,
Claimant, Appellant,

v.

NORFOLK & WESTERN RAILROAD CO. ET AL.,
Libellants, Appellees.

PETITION OF THE MERCHANTS AND MINERS TRANSPORTATION CO.,

for a writ of certiorari to issue to the United States Circuit Court of Appeals for the First Circuit in said cases.

EUGENE P. CARVER,
EDWARD E. BLODGETT,
Of Counsel.

BOSTON:
CARL H. HEINTZEMANN, PRINTER, 234-236 Congress Street, Boston.
1896.

To the Supreme Court of the United States:

THE MERCHANTS AND MINERS TRANSPORTATION COMPANY, a corporation duly organized and existing under the laws of the State of Maryland, and the owners of the steamship "Berkshire," petitions for a writ of *certiorari* directed to the United States Circuit Court of Appeals for the First Circuit, to bring before this Honorable Court the case of The Merchants and Miners Transportation Company, Libellant, Appellant, *v.* Norfolk and Western Railroad Company, Claimant, Appellee (The Steam Towboat "No. 1 Norfolk & Western"), and the case of The Merchants and Miners Transportation Company, Claimant, Appellant *v.* Norfolk and Western Railroad Company et al., Libellants, Appellees (The Steamship "Berkshire").

Your Petitioner respectfully alleges and verifies:

First, That your Petitioner is, and was at the times hereinafter mentioned, the sole owner of the steamship "Berkshire," and that the Norfolk & Western Railroad Company, a corporation duly organized under the laws of the Commonwealth of Virginia, was the sole owner of the steam towboat "No. 1 Norfolk & Western," and also the sole owner of the barge "Norfolk & Western No. 4." That Samuel Castner, Jr., and Henry B. Curran of Philadelphia, Penn., copartners, doing business under the firm name and style of Castner & Curran, were the owners of seventeen hundred and sixty (1760) tons of coal laden on board barge "Norfolk & Western No. 4" at the time of the collision hereinafter set forth.

Second, That on August 16, 1893, a collision took place in Providence River between the steamship "Berkshire" and the barge "Norfolk & Western No. 4" in tow of steam towboat "No. 1 Norfolk & Western." That at the time of the collision the said barge was loaded with seventeen hundred and sixty (1760) tons of coal owned by said Castner & Curran. That by reason of said collision the said barge, with the coal on board, was sunk, and the said steamship "Berkshire" was badly damaged.

Third, That at the time of the said collision, said steamship "Berkshire" was bound on a voyage from Providence, Rhode Island, to Norfolk, Virginia, and the said barge, in tow of said towboat, was bound on a voyage from said Norfolk to said Providence.

Fourth, That on August 17, 1893, your Petitioner filed a libel in the District Court of the United States for the District of Rhode Island against the steam towboat "No. 1 Norfolk & Western," to recover damages sustained by reason of the said collision, alleging that said steam towboat was in fault. That on September 26, 1895, the answer of the Norfolk & Western Railroad Company, the claimant of said steam towboat, in which it denies its liability was filed. That on October 6, 1893, a libel was filed by the said Norfolk & Western Railroad Company, the owner of the barge "Norfolk & Western No. 4," and by said Castner & Curran, the owners of the cargo of coal laden on said barge, against the steamship "Berkshire" for damages resulting from said collision; and on October 31, 1893, The Merchants & Miners Transportation Company filed an answer thereto.

Fifth, That thereafter the case was tried before the Honorable George M. Carpenter, Judge of the United States District Court for the District of Rhode Island, who heard the same upon proofs taken before a Comissioner, according to the rules of the said United States District Court for the District of Rhode Island, no witnesses appearing in person before said Judge, and thereafter the said District Judge found that the said steamship "Berkshire" was alone in fault, and ordered that the libel of the said Merchants & Miners Transportation Company against the steam towboat "No. 1 Norfolk & Western," be dismissed, and that an interlocutory decree be issued in favor of the libellants in the case of the Norfolk & Western Railroad Company *et al. v.* the steamship "Berkshire," for full damages caused to the said barge and cargo by reason of said collision.

No opinion was ever delivered by the United States District Judge, nor was any reason assigned by him for said order, or why the same was issued.

Sixth, That thereafter, after a final decree, appeals were taken in both cases by the Merchants & Miners Transportation Company to the United States Circuit Court of Appeals for the First Circuit. The cases came on for trial and were heard together before Judges Colt, Putnam and Nelson in said Court; and on June 23, 1896, an opinion was filed by said Court in which the decrees of the District Court were affirmed (the Hon. William L. Putnam delivering the opinion, a copy of which will be found in the Record of this case).

In the said opinion the Court finds, viz:—

(*a*) That the steamship "Berkshire" was in fault for the said collision, using the following language:—

"The 'Berkshire' was plainly in fault in two particulars: she was moving too fast in that narrow channel, with many vessels about, and this tug with her long tow approaching; and Revised Statutes, sec. 4233, rule twenty-one, required her at least to 'slacken her speed' under the circumstances, which she did not do seasonably."

(*b*) That the steam towboat was not in fault as put in issue. The Court using, however, in this connection, the following language:—

"The tug alleges and offers proof that she gave a signal of one whistle and got no reply. It may be that she was, therefore, in fault, under the Supervising Inspectors' Rule III, approved February 19, 1892, and having the force of law (Belden *v.* Chase, 150 U. S. 674, 698; The Delaware, 161 U. S. 459, 467), for not promptly giving the danger signal and stopping, which she could perhaps have done without danger to her tow, as she was running against the tide. The Galatea, 92 U. S. 439, 446. But neither the pleadings nor the assignments of errors raise this question, so we cannot with justice give it consideration. The same is true as to the proposition urged upon us that the tug should have stopped because she was heading against the current; although this rule was especially applied to like circumstances in The Talabot, 15 P. D. 195, a well considered case, which, availing here, would perhaps hold that the tug, before making the turn, was bound to wait for the 'Berkshire' to pass, and this independently of any local usage."

Seventh, That the United States Circuit Court of Appeals for the First Circuit should have found that the rulings of law were not correct, and that the findings of fact of the said District Court were not warranted by the evidence in the case, and failed to make other rulings of law and findings of fact that should have been made.

1. The Court should have found that the steamship "Berkshire" was not at fault in proceeding at the rate of speed that she did in the Providence River.

2. The Court should have found that due precaution to slacken her speed was made by the steamship "Berkshire," and that the same was seasonably done.

3. The Court should have found that as far as the steamship "Berkshire" was concerned, she stopped and reversed in time as required by law.

4. The Court should have found that the steam towboat "No. 1 Norfolk and Western" was in fault for the said collision.

Eighth, That the said U. S. Circuit Court of Appeals made certain rulings of law in said cause which are different from the rulings made by the Supreme Court of the United States.

Ninth, That a writ of certiorari should issue in this case on the following grounds, viz: —

1. That the said Circuit Court of Appeals was in error in holding, in the absence of a rule of law or custom, that in harbors or inland waters of the United States, it was the duty of a steamship to keep on the starboard side of the channel, and which rule is contrary to the decision of this Honorable Court in the case of The Delaware, 161 U. S. 459.

2. That the rule of law stated in this case is different from the rule of law as stated and applied in the case of The Metropolitan S. S. Co. *v.* The British and North Atlantic S. S. Co., in the Circuit Court of Appeals for the First Circuit, 74 Fed. Rep. 316.

In this connection it may be said that the Judges sitting in the last mentioned case and the case at bar were not the same, in fact had the Court in that case been constituted as in the case at bar the decision would have been different.

These two decisions tend to produce conflict in the same Court, which arises from the manner in which the Court is constituted, the circumstances of the two collisions being in many respects very similar.

3. It being a fault on the part of a tugboat and barge to proceed up a narrow channel with such a long tow line.

4. That it was the fault of the tugboat and barge to proceed across a narrow channel in such a way as to block the channel.

5. That it was a fault on the part of the barge in not putting her helm to starboard more promptly.

6. That it was a fault of the barge in not following directly in the wake of the tug.

7. That it was a fault on the part of the towboat in not stopping and reversing in time.

8. That it was a fault on the part of the towboat and barge in not letting go of the hawser when the danger of a collision was apparent.

9. That it was a fault on the part of the barge in not sounding a danger signal, when her one whistle was not answered.

10. The amount of the decree being over thirty-five thousand dollars ($35,000).

WHEREFORE, your Petitioner prays that a writ of *certiorari* may be granted by this Honorable Court to the United States Circuit Court of Appeals for the First Circuit.

EUGENE P. CARVER,
EDWARD E. BLODGETT,
Proctors for Petitioners.

THE MERCHANTS AND MINERS
TRANSPORTATION COMPANY,
by ELLERTON P. WHITNEY, *Director.*

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS. CITY OF BOSTON.

I hereby certify that on the fifteenth day of October, 1896, before the subscriber, a Notary Public for the Commonwealth of Massachusetts, in and for Suffolk County, personally appeared ELLERTON P. WHITNEY, for and in behalf of THE MERCHANTS AND MINERS TRANSPORTATION COMPANY, and made oath that the matters and facts containined the foregoing petition are true as therein set forth, to the best of his knowledge, information and belief.

WITNESS my hand and Notarial Seal the day and year above written.

[SEAL] STEPHEN R. JONES,
Notary Public.

I, EUGENE P. CARVER, duly admitted to practice in the Supreme Court of the United States, hereby certify that I have examined the foregoing Petition for a writ of *certiorari*, and in my judgment, from the matters stated therein, the writ ought to issue.

EUGENE P. CARVER.

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164-707

Office Supreme Court, U.S.
FILED
OCT 19 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

**THE STEAM TOWBOAT "No. 1,
NORFOLK & WESTERN."**

THE MERCHANTS AND MINERS TRANSPORTATION COMPANY,
Libellant, Appellant,
v.
NORFOLK AND WESTERN RAILROAD CO.,
Claimant, Appellee.

629
+
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THE STEAMSHIP "BERKSHIRE."

THE MERCHANTS AND MINERS TRANSPORTATION COMPANY,
Claimant, Appellant,
v.
NORFOLK & WESTERN RAILROAD CO. ET AL.,
Libellants, Appellees.

BRIEF

in support of the Petition for a writ of certiorari.

EUGENE P. CARVER,
EDWARD E. BLODGETT,
Of Counsel.

BOSTON:
CARL H. HEINTZEMANN, PRINTER, 234-236 Congress Street, Boston.
1896.

Supreme Court of the United States.

THE STEAM TOWBOAT "No. 1, NORFOLK & WESTERN."

THE MERCHANTS AND MINERS TRANSPORTATION COMPANY,
Libellant, Appellant,
v.
NORFOLK AND WESTERN RAILROAD CO.,
Claimant, Appellee.

THE STEAMSHIP "BERKSHIRE."

THE MERCHANTS AND MINERS TRANSPORTATION COMPANY,
Claimant, Appellant,
v.
NORFOLK & WESTERN RAILROAD CO. ET AL.,
Libellants, Appellees.

BRIEF FOR PETITIONER.

STATEMENT OF THE CASES.

The cases here presented relate to a collision which took place near Sabin's Point, Providence River, on the afternoon of August 16, 1893, between the Steamship "Berkshire" and Barge "Norfolk & Western Number 4," in tow of Steam Towboat "Norfolk & Western Number 1," by reason of which the Barge and cargo sank and the Steamship "Berkshire" was damaged.

The Steamship "Berkshire" was and is an iron screw steamship of two thousand and fourteen (2014) tons register, two hundred and sixty (260) feet long and forty-three (43) feet wide, and at the time of the collision drew fourteen (14) feet, six (6) inches forward, and eleven (11) feet, ten (10) inches aft.

She has compound engines and steers by steam, and has a right-handed propeller, and her normal full speed is about eleven and one-half (11 1-2) knots.

Hooper, pp. 86 and 87.

The wind at the time was very light, and from the north and east; the weather clear and the tide was ebb, the strength of the same being in dispute, the witnesses for the "Berkshire" claiming its strength to be between two (2) and three (3) knots, and most of those for the Tug and Barge claiming it to be about one and one-half (1 1-2) knots, running against the tug and tow, and with the "Berkshire."

The Norfolk & Western Barge No. 4, in tow of Norfolk & Western Towboat No. 1, both owned and managed by the Norfolk & Western Railroad Company, was bound to Providence, R. I., with a cargo of about seventeen hundred and sixty (1760) tons of coal from Norfolk, Va.

The Towboat was and is a large ocean tug, one hundred and thirty-five (135) feet long, and was towing the Barge with a hawser connecting, claimed by the petitioner to be from five hundred (500) to six hundred (600) feet long, and by the Norfolk & Western Railroad Company to be about three hundred (300) feet in length.

The Barge was a large barge, stated by her master to be one hundred and ninety-eight (198) feet keel, or two hundred and ten (210) feet on deck (Burnett, Record, p. 189, Int. 265), thirty-eight (38) feet wide, and drew at the time of the collision eighteen (18) feet, six (6) inches of water, the length of the Tug and Tow together being, therefore, according to the Petitioner's claim, nine hundred and forty-five (945) feet, and by the said Norfolk & Western Railroad Company six hundred and forty-five (645) feet in length.

When the two vessels first came within sight of each other, the Steamship "Berkshire" bore upon the starboard bow of both the Towboat and the Barge, and remained there all the time until the collision took place.

Hayward (mate of Barge), p. 161, X-Int. 120.
Elies (wheelsman of Barge), p. 172, X-Int. 56.
Burnett (master of Barge), p. 182, Int. 145.
Baker (Master of Tug), p. 209, Int. 39.

That the angle of the collision was about three points is also acknowledged by all of the witnesses who testify on the point, the Barge being struck on her starboard bow. The compass course of the Towboat is given by her master as north by east, and that of the Barge as north.

Baker, p. 210, Int. 48.

The "Berkshire" was heading southwest one-half south, by compass.

Hooper, p. 88, Int. 62.

The time of the collision is given by two witnesses, one as 3.06 P. M., and by another as 3.07 P. M.

Before the collision took place the Steamship "Berkshire" reversed, and the Barge put her helm to starboard.

ISSUES OF LAW AND FACT.

The Assignment of Errors is found upon the 15th and 37th pages of the Record ; owing to the fact that the learned Judge of the District Court did not either write an opinion or give any findings of fact or reasons for his decision, the said Assignment of Errors could not be fully and clearly stated.

The question of the Act of Congress of February 13 1893, was fully argued before the District Court, this being before the decision of the Supreme Court of the United States, in the case of

The "Delaware," 161 U. S. 459.

The collision being in Providence River, the first question to consider is, what rules of law are to govern.

This question, which is one that has often been discussed in cases of collision, has been lately decided by the Supreme Court in the case of the "Delaware," just referred to.

This case holds that International Rules do not apply in cases like the one under discussion.

THE CASE IS GOVERNED BY THE RULES LAID DOWN IN THE REVISED STATUTES OF THE UNITED STATES, AND BY THE RULES OF THE INSPECTORS OF STEAM VESSELS, WHEN THE SAME ARE NOT IN CONFLICT.

In the case at bar, there is no grave dispute as to the relative approach of the two vessels from the time that they first came within a mile of each other.

The compass course of the Steamship "Berkshire," as given by her master and officers, is southwest, one-half south.

Hooper, p. 88, Int. 62.

The captain of the Tugboat gives her course as about southwest.

Baker, p. 223, Ints. 217 and 220.

The master of the Tugboat gives his course as north by east, and that of the Barge as about north.

Baker, p. 210, Int. 48.

The claim of the Norfolk and Western R. R. Co., as stated in its pleadings, was that the two vessels were approaching end on, or nearly end on, and that the vessels should be governed by the rule known as the "Head and Head Rule," which is as follows: —

RULE 18. If two vessels under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

U. S. Revised Stat., Sect. 4,233.

Laying aside the consideration that this collision took place in a channel with a turn in it, and taking the case of vessels on the open sea, in order to have this rule apply, this condition must exist.

(*a*) *The vessels must be meeting end on, or nearly end on.*

In the International Rules of 1885 the meeting of end on has been thus defined : —

"The only cases to which it does apply are when each of the two ships is end on, or nearly end on, to the other ; in other words to cases in which, by day, each ship sees the masts of the other, in a line, or nearly in a line, with her own, and by night to cases in which *each* ship is in such a position as to see *both* of the side lights of the other.

"It does not apply to cases, by day, in which a ship sees another ahead crossing her course, or by night to cases where the red light of one ship is opposed to the red light of the other, or when the green light of one ship is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both red and green lights are seen anywhere but ahead."

It has been stated in the Inspectors' Rules as follows : —

"In the night, steamers will be considered as meeting head and head so long as *both* the colored lights of *each* are in view of the other."

Rules for the Inspectors of Steam Vessels (1894), Rule 1, page 67.

"Vessels on courses one point from opposite have been held to be not meeting end on within the meaning of this rule, but to have been crossing ships."

The "Constitution," 2 Moore, P. C., N. S. 459.

In the case of two vessels being on courses of from one to one and a half points from opposite, the meeting rule was held not to apply, by the Privy Council of England, in the case of: —

The "Ava," 2 Asp. N. S. 182.

The Judge below had found (see page 183), "that the case was one of vessels meeting nearly end on, each having the other (according to calculation) not over a point on the bow." But —

On appeal, Sir James Peacock delivered the opinion for the Privy Council, first giving the interpretation of this rule as explained by other statutes, similar to our Statutes of 1885, and then stating, "there can be no doubt, even if the additional rules had not been made, that Rule 13 was not properly applied to such a case as the present, for their Lordships are of the opinion that one was steering south-southwest, and that the "Ava" was then steering north 41° east by compass, which may be taken as somewhere between northeast and northeast by north. It is clear that two vessels so steering could not be considered as vessels each having the other not more than a point on her bow, or as meeting end on within the meaning of the rule."

Again, the contention that the "Berkshire" was on the wrong side of the channel has no application, as, under the Revised Statutes, no such rule exists, and the International rules do not apply, as has already been stated.

The rules of the Revised Statutes that do apply are: —

RULE 19. If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

And

RULE 23. Where, by rules 17, 19, 20 and 22, one of the two vessels shall keep out of the way, the other shall keep her course, subject to qualifications of rule 24.

This rule is the same in the law of 1885; see articles 16 and 22.

If the vessels were on crossing courses and the tug and tow had the "Berkshire" on their starboard hand, then it was the duty of the Tug and tow to keep out of the way.

That this rule applies to harbors even when the courses change therein.

See

The "E. A. Packer," 140 U. S. 360. (Collision in New York Harbor.)

The "Leverington," 11 P. D. 117. (Collision at the entrance of Cardiff Docks.)

The "Lagonda," 42 F. R. 304. (Collision near Brooklyn.)

The "Hercules," 51 F. R. 452. (Collision in Cooper River, Charleston Harbor, S. C.)

The "Corsica," 9 Wall. 630. (Collision in New York Harbor.)

The "Oceano," 3 P. D. 60. (Collision in River Thames.)

The "Grand Republic," 16 F. R. 424. (Collision in North River.)

In the case of the "Grand Republic," it was clearly stated that where one boat was going up North River and the other coming down, the two vessels were on crossing courses and came within rule 19 and not rule 18.

See also the diagram given by Judge Bradley in the "Corsica," 9 Wallace, 630 at 632.

In the "Lagonda" (*supra*), a collision happening in the channel between Governor's Island and the Brooklyn shore, where a tug came around the south shore of Governor's Island, Benedict, Judge, says: "The vessels were on crossing courses. The yacht having the tug on her starboard hand, by law it was the right of the yacht to choose her own method of avoiding the tug, and it was the duty of the tug to hold her course."

In the "Grand Republic," 16 F. R. 424, both boats were held in fault, the "Adelaide" for not stopping and reversing sooner; and Judge Brown finds that the courses differed at least a point. They were, therefore, on crossing courses, and not end on, and the "Grand Republic" should have kept out of the way. She tried to cross the bow of the "Adelaide," and there was not time, and for this she was held in fault.

The "B. B. Saunders," 25 F. R. 727, was a case of crossing courses, and the "Orient," whose duty it was to keep out of the way, first blew two whistles and tried to go ahead across the bow of the "Saunders," and then blew one whistle to go astern, and she was held to blame.

In the "Admiral," 39 F. R. 574, the vessels were on crossing courses in the East River, and the "Croton," having blown two whistles, attempted to cross the bow of the "Admiral." There was not time, a collision occurred, and the "Croton" was held to be to blame.

In the "John King," 49 F. R. 469 (2 Ct. Ap.), Judge Wallace finds on appeal that the vessels were on crossing courses. That when about a quarter of a mile away the propeller had a ferryboat on her starboard hand, and there was risk of collision unless she did something to avoid her. She blew two whistles, and starboarded her helm and tried to cross the bow of the ferryboat. The red light of the ferryboat was visible and there was nothing to prevent her passing astern. This was held to be a fault.

The ferryboat held her course, as was her duty, and on appeal it was found that she reversed in time.

The Steamship "Berkshire" had therefore under the Revised Statutes the right of way, and it was the duty of the Towboat and barge to keep clear of her.

In this connection an examination of the rules as laid down for the guidance of pilots by the Inspectors of Steam Vessels discloses the fact that the situation of the "Berkshire to that of the Towboat and Barge was that of the Seventh Situation.

Inspectors' Rules, 1894, p. 73, Seventh Situation.

It was therefore her duty, "if so near as to fear collision, to starboard her helm and pass clear."

If any duty was therefore imposed upon the "Berkshire," it was the duty to starboard.

In their opinion in this case the Circuit Court of Appeals say: —

"It must be admitted that, especially in a channel so narrow, each pilot was bound with peculiar exceptions here to keep well over to the side on his starboard hand."

This is the rule stated in the International rules of 1885, but as we have already shown has no application in the case at bar, *because the rules which govern are those of the Revised Statutes as supplemented by the Inspectors' Rules.*

The cases cited by the Court are all cases governed by the rules of 1885, or by a special rule which applies to New York Harbor.

The rule of law stated by the Court in the case at bar is contrary to the decision of this Honorable Court in the case of "The Delaware" (*supra*). It is clearly also at variance with the decision of the same Court, in the case of The Metropolitan Steamship Co. *v.* British and North American Steamship Company, 74 Fed. Rep. 316.

In the latter case, however, it will be noted that Judge Putnam, who delivered the opinion of the Court in the case at bar, dissents from the opinion of the majority of the Court, and that Judge Nelson, another Judge in the case at bar, was the District Judge whose opinion was in that case reversed; and that said two Judges constituted a majority of the Court in the case at bar.

The nature, width and bend of the channel was nearly the same in the two cases, and both collisions took place in the same Circuit.

In principle the two cases cannot be reconciled.

I.

THE TUGBOAT AND BARGE WERE CLEARLY AT FAULT.

In the case at bar the Tugboat and Barge are to be considered as one vessel under steam, and though both were owned by the same party, still each owed certain duties to another vessel that might be approaching, apart from the duty owed by the other.

The faults of the Tugboat and Barge were :—

1. *In proceeding up a narrow channel with such a long tow line.*

2. *In proceeding across a narrow channel in such a way as to block the channel.*

3. *In the Barge not putting her helm to starboard more promptly.*

4. *In the Barge not following directly in the wake of the Tugboat.*

5. *In not keeping clear of a vessel having the right of way.*

6. *In not having proper lookouts.*

7. *In not stopping and reversing in time.*

8. *In not letting go of the hawser when danger of collision was apparent.*

9 *In not sounding a danger signal when her one whistle was not answered.*

1. In proceeding up a narrow channel with such a long tow line.

This involves first the questions of fact as to what was :—

(*a*) *The length of the tow line.*
(*b*) *The width of the channel.*
(*c*) *The surrounding circumstances.*

(*a*) THE LENGTH OF THE TOW LINE.

The witnesses for the Petitioner testify that in their opinion the length of the tow line was from 75 to 100 fathoms.

James W. Pratt, engineer of the "Berkshire" (p. 45, Int. 45), 90 fathoms. She had full 90 fathom line out.

Peter Keine, helmsman, between 90 and 100 fathoms (p. 76, Int. 64; p. 80, X-Int. 130).

Thomas Callahan, seaman. (p. 81, Int. 12.)

Luther E. Hooper, master (p. 90, Int. 84), about 100 fathoms.

John H. Dizer, about 90 fathoms. (p. 133, Int. 20; p. 104, Int. 18; p. 105, X-Int. 26.)

Moses B. Rich, who was in command of the steamer "Planet," was near at the time of the collision, and thinks about 100 fathoms was the length of the tow line.

Frank W. Rockwell, who was another disinterested witness, estimates the length of the tow line as between 500 and 600 feet. (p. 126, Int. 13.)

On the other hand the witnesses for the Tugboat and Barge give the length of the hawser as about 50 fathoms.

George Haywood (p. 155, Int. 10), 50 fathoms. He states that the hawser that they had out originally, before some of it was taken in, was 175 fathoms (p. 161, Int. 105), and this they took in about 300 feet (X-Int. 106).

John Neilson, cook of the Barge, states the length of the hawser as 50 or 60 fathoms. (p. 164, Int. 9.)

Charles F. Burnett, captain of the Barge, says 50 fathoms. (p. 174, Int. 20.)

H. L. Sampson, engineer of the Tug, who was on the Barge, places the length about one and one-half that of the Barge, which would be 315 feet. (p. 191, Int. 5.)

O. S. Baker, master of the Tug, thinks about 50 fathoms. (p. 207, Int. 5.)

John W. Farrell, mate of the Towboat, 50 fathoms. (p. 224, Int. 8.)

John H. McGuire, who saw the hawser as it was pulled off from the Tug and saw it was wet, and who testified that it was his business to buy rigging in a lump, judged the hawser that was wet to be from 80 to 90 fathoms. (p. 128, Int. 20; p. 129, Int. 35).

John Very, who was right opposite on shore, gives the length of the hawser at 350 feet. (p. 244, Int. 14; p. 246, Int. 32 and 33.)

Therefore, if we should take the greatest length given by the witnesses for the Norfolk and Western, we would have somewhere in the neighborhood of 400 feet; and the shortest length as given by the witnesses for the Petitioner would make it about 500 feet in length. We can therefore reasonably assume that the hawser was somewhere from 400 to 500 feet in length. The length of the Tug is stated to be 135 feet, and that of the Barge 210 feet. This gives a total length of tow line and of the Towboat and Barge of from 750 to 850 feet.

(*b*) THE WIDTH OF THE CHANNEL.

As to the width of the channel there is great dispute, witnesses for the Petitioner, being those of pilots and masters of steamers, claiming the width of the channel at that point to be from 300 to 400 feet. (Hooper, p. 89, Int. 67.) When he speaks of the width of the channel, he refers to the width of a channel in relation to a vessel of the draft of the "Berkshire." (p. 98, Int. 206.) And it should be remembered that Captain Hooper has had a great deal of experience going up and down the Providence River with vessels of this nature.

O. S. Baker, captain of the Towboat, says that the channel has 15 feet of water for the width of 1200 feet, at the place of the collision. (p. 210, Int. 56.)

Pratt, engineer of the "Berkshire," who lives in Providence, and who has been on steamers as engineer since 1867, says that the channel is from 300 to 400 feet wide. (p. 50, X-Int. 129.)

Thomas J. Keough, second mate of the "Berkshire," places it at about 300 feet. (p. 66, Int. 75.)

Charles Simmons, a witness called by the Norfolk and Western, says that the channel is 1,000 feet wide (p. 250, Int. 17), but does not state for what depth of water.

It will be noticed with reference to the width of the channel, that at the exact point of the collision there is a little bight which makes in to the western shore nearly opposite the lighthouse on Sabin's Point. The normal width of the channel which is above the lighthouse, according to the government chart, measures 359 feet, and below the light it measures 625 feet. We can, therefore, safely assume the width of the channel from bank to bank at low water did not much exceed the estimate given by the Petitioner's witnesses. The compass course of the channel below the light, as shown on the chart, is about north by west, and above the light is about southwest half south. We therefore have a tug and barge which, with a connecting tow line of the length as given above, lying at an angle across the channel which does not exceed 500 feet in width, heading north by east, which, provided the length of the tug and tow was 800 feet, would give only about 100 feet of clear water on either side. This is clearly negligence on the part of the Tow and Barge in attempting to go up through a narrow channel with such a long tow line, because in the turning at any one of the bends in the channel they would obstruct the whole channel.

In this connection the Petitioner produced evidence not merely of those on board of the Steamer "Berkshire," but those of pilots and steamboat captains who are familiar with the river.

Henry Miller, who was on the "Petrel," states that the Barge and tow occupied nearly the whole width of the channel. (p. 152, Int. 18.)

The "Petrel" was right near the "Berkshire" at the time of the collision, about 200 or 300 yards off (p. 151, Int. 11), and was obliged to go east of the buoys.

William D. Flannagan, who was a licensed pilot and familiar with these waters, having had a license here for 10 years (p. 143, Int. 6), and at the time was on the "Planet," thinks that the hawser was from 75 to 80 fathoms (p. 144, Int. 21); does not think it was safe at that place for a towboat and barge in tow with such a long hawser, but that the proper way would have been to have towed alongside. (p. 146, Int. 35.)

Frank P. Barrows, who was on the "Planet" and saw the tow line, testifies that it is dangerous navigating a tow with such a tow line as connected the Towboat and Barge. (p. 140, Int. 25.)

John E. Nevil, who was on shore and lives near there, estimates the length of the hawser as from 100 to 125 fathoms (p. 119, Int. 9); says that it is not customary to tow with such a long hawser so far up the river. (p. 120 Int. 19.)

Horace M. Carr was the master of the steamer "Manola," who was near at the time of the collision, and places the length of the tow line at five hundred feet. (p. 114, Int. 31.) He had passed the Tug and tow before the collision; does not think that it is prudent navigation to tow with such a tow line in that part of the harbor. (p. 114, Int. 32.)

Joseph H. Spooner, the master of the "Bay Queen," states that in his opinion it was not prudent navigation to tow with such a long tow line as connected the Towboat and Barge, and he noticed the length as his boat passed them. (p. 110, Int. 19.) He states that he knows the width of the channel, and that the Barge in tow could not round the point without taking the whole of the channel; that he has seen it a good many times. (p. 111, X-Int. 24.)

Richard B. Gibbs, the master of the steamer "Petrel," and who saw the tow line, does not think it safe to tow with such a long tow line around Sabin's Point or up the Providence River. (p. 108, Int. 28.)

Moses B. Rich, on the "Planet," who has run coal barges and vessels, and who saw the tow line, does not think it prudent navigation to tow with such a long tow line. He saw it at the time. (p. 124, Int. 20.)

In rebuttal, the Norfolk & Western R. R. Co. produced witnesses, people who are all interested in towboats, either as masters or owners of towboats, who testified that it is customary to tow up the Providence River with a long tow line, and they think seventy-five to eighty fathoms is a proper length of tow line, in fact, the longer the better.

We submit that the weight of the unbiased testimony was that towing with such a long tow line is improper, considering the length of the Barge and the length of the tow, and the fact that they were constantly making turns in the channel.

In the case of the "Robert Robinson," 55 F. R. 103, decided in 1893 by Judge Brown of New York, it was held to be a fault for a towboat to tow a vessel near Governor's Island, New York, with a hawser in excess of 100 feet in length, and that the length of the hawser contributed to the accident. In this case the width of the channel at Governor's Island is several times the width of the channel at Sabin's Point.

In the case of the "Brinton," 50 F. R. 581, which was a collision between a tug and a steamboat attempting to pass each other in the Kill Von Kell, a channel 1,000 to 1,100 feet wide, in a strong tide, the fact that the end of the tow came in collision with another vessel was held to be a fault.

In the case of the "Josephine B.," 58 F. R. 813, it was held not to be a fault for taking a single schooner through Hell Gate in tow, having a hawser 250 feet long, in the absence of any special regulation on the subject, and the testimony of unbiased experts being so conflicting that the Court could not arrive at a satisfactory conclusion.

The Court in stating the matter, however, uses the following language: —

"As to the alleged fault, the taking of her tow through Hell Gate on a hawser of such length, we should be inclined to hold her responsible. Such a method of navigation seems unwise; but not only is there evidence that it is quite common, when a tug has a single large schooner in tow, but some of the experts testify that such is the safer course, and that the other method would render control of the tug more precarious, while not increasing materially her control of the tow. We concur with the District Judge in the conclusion that the conflict between the experts is so great that, in the absence of any special regulations on the subject, the party holding the affirmative of the question has not shown towing on a hawser to be a fault, by a fair preponderance of proof."

In the case at bar it should also be noted that the width of the channel at Hell Gate is greater than that at Sabin's Point, and that there are cross currents and two channels.

(*c*) THE SURROUNDING CIRCUMSTANCES.

The fact that the channel was narrow, and the tow line was a long one, should be considered with the fact that it was in the summer, that a great many steamers and other kind of vessels were constantly going up and down the river to points both above and below Providence, and that the sole motive power was that of the Towboat. That the witnesses called by the Norfolk and Western Railroad Company agree that the Towboat could have towed up this river alongside the Barge in perfect safety, and that the reason that they towed with a hawser of such length was merely because it was more convenient.

Baker (master of Towboat), p. 219, Ints. 175–178.
Burnett (master of Barge), p. 181, Ints. 125–126.

That the Barge could have been towed with perfect safety with a tow line of less length is shown by the local regulations on the rivers Tyne and Tees, in England, on both of which the channel is wider than in the place where the collision took place. In the Tyne, the length of the tow line is limited not to exceed twenty (20) fathom, in the Tees, not to exceed twenty-five (25) fathom.

See Rules in Marsden on Collision, 3d ed.
Tees Rules, p. 574, Rule 30.
Tyne Rules, p. 591, Rule 30.

The length of tow line has been restricted in certain parts of the Thames so as not to exceed fifty (50) feet.

Marsden on Collision, p. 576, Rule 4.

It might not be considered fair to compare the Thames, however, in this connection, but the other two rivers we submit are a fair comparison.

These rules can be fairly quoted as testing the truth of the statements of the witnesses called by the Tugboat and Barge, that the length of tow line here given is the shortest which could be safely towed with, and support the contention of the witnesses called by the Petitioner that the tow line should have been a much shorter one than it was.

We submit that in the case at bar there can be no doubt but what it was the length of the tow line which was one of the causes of the collision, as the "Berkshire" would not have struck the Barge at all provided the tow line had been only one-half the length that it was.

2. In proceeding across a narrow channel in such a way as to block the channel.

The channel course of the Towboat and Barge would have been north by west, provided the regular compass course had been taken, if we accept the course of north by east stated by the master of the Towboat as the course the tow was heading. (Baker, p. 210, Int. 47.) The angle of these two courses, considering the length of the hawser, would block the channel.

This course was one that was taken after the lighthouse had been reached, and at this time the Towboat and Barge took up the whole of the channel.

Spooner (master of Steamer "Bay Queen"), p. 110, Int. 18.
Nevil (fisherman on shore), p. 119, Int. 15.
Miller (on "Petrel"), p. 152, Ints. 15–17.

At the time of the collision, the Towboat and Barge had not completed swinging around Sabin's Point, and, with a tow line of the length that connected the two vessels, they would take up the whole channel, and the Barge would be more to the eastward than the Towboat.

The proper course for the Towboat to have adopted was, inasmuch as she was coming up against the tide, to stop and wait until the Steamship "Berkshire" went by.

The "Osceola," 50 Fed. R. 326.

3. In the Barge not putting her helm to starboard more promptly.

4. In the Barge not following directly in the wake of the Tugboat.

These two propositions we will consider together, because the argument of one necessitates considering the other. In America the rule has been long established that, when a vessel is proceeding in tow of a steamer, she should directly follow in her wake. The rule was thus stated in the case of the "Margaret," 94 U. S. 494:—

"It was the duty of the brig to follow her guidance, to keep as far as possible in her wake, and conform to her direction."

In another case, the schooner in tow was held in fault for not following in the wake of the tug.

The "Margaret," 2 Fed. R. 255.

In order to be able to follow directly after the towboat in crowded waters, the tow line should not be a very long one. In the case of the "Delaware" (*supra*) it appears that the length of the tow line was 15 fathoms.

In the case of the "Niobe," 13 Prob. Div. 55, the Court held the tow in fault for not keeping a good lookout, and, in that particular instance, in not porting until it was too late to avoid the collision.

It will be noted that the test in this case was applied to a third vessel, and not as between tug and tow, where the relation might have been different, owing to the contract which might exist between the two parties. Although the law has been stated by the Supreme Court of the United States, in the case of the "Cirilta," 103 U. S. 699, that a ship and tug in tow are, in law, one vessel, it simply refers to the obligations that they owe to a third vessel approaching them, with reference to the rules for preventing collisions at sea.

In this connection, as to the duties which are incumbent upon vessels in a tow, when a river is crowded, see the case of the "Syracuse," 12 Wallace, 167.

It has often been stated that it is the duty of the tow to follow the manœuvres of the towboat.

In the case of the "Jane Bacon," 27 Weekly Rep. 35, the Court of Appeals, Lord Justice Brett, in delivering the opinion of the Court, says: —

"We are all of the opinion that a vessel being towed as the 'Jane Bacon' was, has this duty: she is bound to look ahead even more carefully than if she could see everything, and to watch sharply the towing vessel, and follow her manœuvres. She should anticipate what the towing vessel will do, and watch her so as to follow as exactly as possible."

In the case at bar, it must be conceded that if the tow had been heading directly behind the Tug, no collision would have taken place. That if the helm of the Barge had been put hard to starboard earlier, no collision would have taken place on board of the Barge, is testified to by Dizer, the mate of the "Berkshire."

Dizer, p. 135, Int. 55,

That if the Barge had been heading the same course as the tow, there would not have been any collision.

Hooper, p. 92.

The master of the Tug shows, by his answers on cross-examination, that, in his opinion, if the Barge had changed her course before, there would not have been any collision.

Baker, p. 221; X-Ints. 192–199.

See, also, the examination of Burnett, captain of the tow, in which he acknowledges that he could have starboarded his helm before.

Burnett, p. 190; X-Ints. 276–278.

We submit, therefore, that both of these two faults were established, and are faults which contributed to the collision.

5. In not keeping clear of the vessel having the right of way.

We wish to refer in this connection to the case of "The Delaware" (*supra*). The duty that was imposed upon the Tug and tow was clearly to keep out of the way of the Steamer. They were coming up the harbor, and, by reason of the fact that there were two vessels, more or less incumbered, and they were approaching a number of vessels near each other, and were bound to know that there was a strong ebb tide setting down the river. If the Tug and tow could not, therefore, make the proper manœuvres imposed upon them by the law, they should have stopped, or delayed going up the river until the other vessels had passed.

The "Syracuse," 12 Wallace, 167.

If the tow was so constructed that she was unable to comply with the law imposed upon a vessel under steam, that fault was one of her own, for which she should be held liable.

This rule has been stated in the case of the "Irrawaddy," Admiralty Division, cited in Marsden on Collisions, p. 402, n. b.

The owners or agents have no right to send a vessel to sea that cannot comply with the statutory requirements, and the fact that they did so is of itself a fault. Therefore we submit that if in this particular the Towboat and Barge could not comply with the law, it being well established that a tug and tow under these circumstances are one vessel, they should be held to blame.

6. In not having proper lookouts.

The only lookout on board of the Tugboat, as far as the evidence discloses, was that of the master, who was in the pilot house. This was clearly not in compliance with the law, as he was both the officer of the deck and the lookout. In addition to that there should have been a lookout on the stern of the Towboat to watch the Barge and apprise her of danger.

In the case of the "Virginia Ehrmann," 97 U. S. 309, the ship was held in fault for not timely changing her helm, and also at fault for not having a proper lookout.

In the opinion of the Supreme Court of the United States in that case Judge Clifford discusses the whole subject fully. Both towboat and tow were held to blame, the doctrine being that where the tugboat is incumbered with a tow they must use extraordinary precautions to avoid danger.

7. In not stopping and reversing in time.

No attempt was made by the Tug to stop and reverse. If she had done so and the hawser had been cast off, the collision would have been avoided, because in the case at bar the evidence discloses the fact that the "Berkshire" was nearly at a standstill, and with the strong tide that was flowing down, the Barge would not have made any headway over the land, considering the length of hawser which intervened between the tow and Barge.

That it was her duty to stop and reverse is shown by a long line of decisions as well as the requirements of the International Rules. She should have stopped and reversed as soon as she saw there was any danger of the "Berkshire" striking the Barge.

The "Manitoba," 122 U. S. 97.
The "Beryl," 9 P. D. 4 (on appeal), 137.
The "Lisbonese," 53 F. R. 293.
The "New York," 53 F. R. 553.

On the question of stopping and reversing, the cases of the "Delaware" (*supra*) and the "Britannia," 153 U. S. 130, merely lay down the rule that the preferred steamer may be excused for holding her course, but it is clearly the duty of the steamer who should keep clear of the other to stop and reverse as soon as any danger is apparent.

8. In not letting go the hawser when the danger of collision was apparent.

This has been held to be a fault by the Court of Appeals in England. In the case of the "Jane Bacon," 27 Weekly Rep. 35, the Court of Appeals states that when a ship is being towed in a sea where other vessels are likely to be met, it is her duty to have the means of immediately slipping or cutting the tow line. This presupposes also, of course, that there should be somebody near the tow line to be able to cast it off. No attempt was made to cast off the tow line in this case, the Tug and Tow's crew were so situated that it could not be done. It was their own fault under that decision, and we submit that the reason given by the Court of Appeals in England for this in the case cited is sound.

9. In not sounding a danger signal when her one whistle was not answered.

The learned Court of Appeals states on page 6 of its opinion that the Tug may have been in fault "for not promptly giving the danger signal and stopping, which she could perhaps have done without danger to her tow, as she was running against the tide." (The "Galatea, 92 U. S. 439, 446.) But neither the pleadings nor the assignment of errors raise this question, so we cannot with justice give it consideration. The Court, no doubt, did not consider what the evidence was in this connection.

The testimony of those in behalf of the Towboat is, that when the Towboat and the "Berkshire" were about three-fourths of a mile to a mile apart, the Towboat blew one whistle.

Baker (master of the Towboat), p. 216, Int. 132.

Those on the "Berkshire" all allege that they never heard a whistle from the Towboat.

This could not therefore have been alleged as a fault by the Petitioner when the libel was filed, and as no opinion or remarks were made by the learned Judge of the District

Court when his decision was rendered, no assignment of errors could have been specially alleged in this particular. In the brief and argument of the case in both Courts these points were all raised.

The faults found by the Circuit Court of Appeals against the Steamship "Berkshire" are, viz. :—

In proceeding at too high a rate of speed.

In not slowing down or stopping and reversing in time.

These two allegations of fault it would be well to consider together. That the "Berkshire" was going down the river in a proper and prudent manner at half speed, her manœuvres in relation to passing the other steamers show; the weather being clear, she would have a right to go at a higher rate of speed. Her speed in this case was no greater than that of the "Talisman" in the case of the "Delaware" (*supra*), and it should be remembered in this connection that she was going with the tide, and the estimates of her speed are undoubtedly over the ground and not through the water. As the tide was acting on both vessels alike, the strength is of no other importance in this case.

It can hardly be claimed, however, by the Norfolk & Western Railroad Company that it was the duty of the "Berkshire" to stop and reverse before she did, when the Towboat, the vessel whose duty it was to keep clear, did not reverse at all.

Baker, Record, 217, Int. 141.

And the master of the Tugboat did not think there was any danger of a collision until after the "Berkshire" had passed her.

Baker, Record, p. 217, Int. 143–145.

That he never blew any danger signal.

Page 221, Int. 191.

The master of the Barge states (page 177) that he saw the "Berkshire" reverse.

Ints. 62, 63 and 64.

That if she had not reversed and had kept her wheel hard a-starboard, he thinks she would have gone clear.

Page 177, Int. 66.

He stated on cross-examination that the speed of the "Berkshire" was not over fast.

Page 185, Int. 193.

That in the opinion of Captain Baker, the master of the Towboat, it was the reversing that caused the collision.

Page 215 and 216, X-Int. 119–123.

As it was, it appears from the testimony of the witnesses who are the best able to judge, that the "Berkshire" had stopped and reversed for a full minute.

Pratt (engineer), p. 46, Int. 56.

Said she was going astern full speed a minute.

Keine (quartermaster), p. 77, Int. 69.
Hooper, p. 91, Int. 102.

Calder, who was at the engine, says it was about two minutes from the time he got the order to back (p. 59, Int. 68).

In this connection it has been shown that the boat must have been going through the water very slowly, as by an actual experiment it takes one minute and twenty-eight seconds, going ahead full speed, for the "Berkshire" to stop dead in the water. The experiment was made when the Steamship was going through the water full speed, at the rate of twelve knots.

Pratt, p. 43, Int. 13.
Dizer, p. 136, Int. 67.

This shows that the "Berkshire" must have been very nearly still when the collision took place, the only speed she was making over the land being the force of the tide, which was from two to three knots.

This is further shown by the testimony of the unbiased witnesses. To such she did not seem to be moving at all.

With regard to speed, it will be noted that the "Petrel" passed the "Berkshire," showing that she was going at a greater rate of speed. We submit, therefore, that the "Berkshire" was going at a moderate rate of speed, and that her stopping and reversing was timely. But it is doubtful if she would have been in fault even if she had not stopped and reversed, as it could not, under the circumstances, have been a fault for her to do so.

We wish to call the attention of the Court to the difference in the manning and management of the Steamship "Berkshire" and that of the Tug and Tow; and this is of great importance in showing the want of care that was exercised.

We assume, and we think fairly, that the ground of the decision of the Circuit Court of Appeals depended wholly upon the fact that they thought and it was argued that the International Rules prevailed, and that the Steamship was bound to go on the side of the channel that lay on her starboard hand in the absence of a provision to the contrary in the Revised Statutes.

We also call the attention of the Court to the fact that more care should always be used by steam vessels going against the tide than one that is going with it, owing to the fact that they can be more readily handled, and this obligation and duty has been stated and acknowledged by the Supreme Court of the United States in the case of the "Galatea," 92 U. S. 439. In that case the Court says: "That where two steamers are about to meet, one running with, and the other against, the tide, if it be necessary that one or the other should stop in order to avoid a collision, the one proceeding against the tide should stop. See also

The "Osceola," 50 F. R. 326.

In the case at bar the Tug never slowed down at all.

It therefore appearing that there is plain error in the opinion of the Court, we respectfully submit that this Honorable Court should grant the writ of certiorari as prayed for.

EUGENE P. CARVER,
EDWARD E. BLODGETT,
Of Counsel.

164-707 164-707

OCT 26 1896

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE STEAM TOWBOAT "No. 1, NORFOLK & WESTERN."

MERCHANTS AND MINERS TRANSPORTATION COMPANY,
Libellant, Appellant,

629 + 630.

v.

NORFOLK AND WESTERN RAILROAD CO.,
Claimant, Appellee.

THE "BERKSHIRE."

MERCHANTS AND MINERS TRANSPORTATION COMPANY,
Claimant, Appellant,

v.

NORFOLK AND WESTERN RAILROAD CO.,
Libellant, Appellee.

BRIEF FOR THE APPELLEES

in the United States Circuit Court of Appeals for the First Circuit in opposition to the petition for a writ of certiorari.

WILLIAM G. ROELKER, *Proctor, for the Appellees.*

PROVIDENCE:
E. L. FREEMAN & SONS, PRINTERS TO THE STATE,
1896.

Supreme Court of the United States.

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MERCHANTS AND MINERS TRANSPORTATION COMPANY,
Libellant, Appellant,
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THE "BERKSHIRE."

MERCHANTS AND MINERS TRANSPORTATION COMPANY,
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v.

NORFOLK AND WESTERN RAILROAD CO.,
Libellant, Appellee.

Brief for the steam towboat N. & W. 1, owners of the barge N. & W. 4 and the cargo of the barge being the appellees in the Court below in opposition to the petition for a writ of certiorari.

These were cross libels in collision.

By agreement the testimony in both cases was taken together, and they were and are to be argued together.

THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE RECORD DOES NOT DISCLOSE QUESTIONS OF "GRAVITY AND IMPORTANCE" WITHIN THE RULE AS LAID DOWN BY THIS HONORABLE COURT IN

Law on Bew, petitioner, 141 U. S. 583.
Re Woods, 143 U. S. 202.

The amount involved, while important to the parties, and sufficient to give jurisdiction to this Court under former legislation, is not of consequence in determining whether the cause is one in which this Court should interfere in the "interest of jurisprudence and uniformity of decision."

Nor, it is conceived, are mere questions of fact in private litigation within the rule.

The grounds alleged in the petition for the issuing of the writ are set forth in the ninth article of the petition, on page 5 and 6 thereof, and are ten in number.

They all, except the first three, relate to and depend for their solution upon questions of the finding of fact.

No difficult or abstruse questions of law are involved, nor any new or important application of old and familiar principles to a complicated state of facts. According as the facts are found one way or the other, the principles of law follow plainly as of course.

The first ground alleged is that the Circuit Court of Appeals erred in holding that in harbors or in land waters of the United States it was the duty of a steamship to keep on the starboard side of the channel, and that such rule is contrary to the decision of this Honorable Court in the case of

The "Delaware," 161 U. S. 459.

And this is further argued in the brief of the learned counsel for the petitioners, at page 25 of the Brief, when they say, "We assume and we think fairly that the ground of the decision of the Circuit Court of Appeals depended wholly upon the fact that they thought, and it was argued that the International Rules prevailed, and that the steamship was bound to go on the side of the channel that lay on her starboard hand in the absence of a provision to the contrary in the Revised Statutes."

This assumption is entirely unfair. The decision of this Honorable Court in the "Delaware" was cited in argument before the Honorable Circuit Court of Appeals and is referred to in the opinion of that Court. See 74 Fed. Rep. 909. It was argued by the undersigned before the Circuit Court of Appeals that possibly the *locus in quo* of the collision in the case at bar, being some miles below the city of Providence and below the dredged channel, was not within the principle of the decision in the case of the "Delaware," and that the International Regulations of 1885 might apply. But Judge Putnam, the learned judge who afterwards wrote the opinion, stopped the argument by the intimation that in his opinion there could be no question that the *locus in quo* was within the inland waters of the United States, and therefore that the International Regulation of 1885 did not apply; and the other judges acquiescing in his remarks, that point in the argument was immediately abandoned.

An examination of the opinion of the Circuit Court of Appeals will show that what they meant was that under the circumstances *of this case* in the narrow channel each pilot was bound to keep well over to his starboard hand. The whole point of the discussion before the Circuit Court of Appeals on the part of the learned counsel for the petitioners, was, as it is now in the brief filed in support of the petition before this Honorable Court, that because at some time before the collision, owing to the bends in the channel, the steamship and the tug and tow were apparently on crossing lines, that therefore rules 19 and 23 applied and the steamship had the right of way. The contention on behalf of the tug and tow was, and the finding of the Honorable Circuit Court of Appeals was, that under all the circumstances of this case the "end on" rule 18 applied and rules 19 and 23 did not apply. It appeared that both the tug and the steamship belonged to regular lines of transportation, running in and out of the harbor of Providence, and were well known to each other; that they had been for many years engaged in running regular trips in and out of that harbor; that both vessels were of a draught which made it impossible for them to be headed for any other point or destination than in and out of the harbor; that there was no port, dock or other place to which the tug and tow could be intending to go except to Providence; that when each vessel sighted the other they both knew that the "Berkshire" was headed out of Providence on her way to Norfolk, her regular point of destination, and that the tug and tow were headed into Providence, up the river; that both knew that there was a bend in the channel there, and that under these circumstances the fact that at some time or other in following the bend they appeared to be crossing was not the only factor to be taken into consideration; that furthermore it appeared that when the vessels first sighted each other both vessels were on the right hand side of the channel, the tug on the easterly side going up and the steamship on the westerly side going down; also that that was the customary way for vessels to navigate in going in and out of Providence river. In these circumstances, as when in following the line of the river the two vessels came together they would meet end on, or nearly end on, necessarily, it was contended that rule 18 prevailed, and that it was the duty of both vessels to keep to the starboard and pass each other port to port; that the tug signified its intention of doing this, by giving one blast of its whistle. And it is submitted that that is what is meant by the Circuit Court of Appeals by the language that they used in discussing this question, and that there is nothing therein which in any way conflicts with or is inconsistent with the decision of this honorable court in the case of the "Delaware."

The second ground alleged by the petitioner as a reason for the issuance of the writ, is that the decision in this case is inconsistent with the decision in the case of the Metropolitan Steamship Company v. The British and North American Steamship Company, in the Circuit Court of Appeals for the First District, 74 Fed. Rep. 316, and that the two decisions tend to produce conflict in the same court; and in support of this point it is stated and argued that the judges sitting in the two cases were not the same, and that had the court been constituted in the same way the decision would have been different. And it is ingeniously argued, at page 9 of the petitioner's brief, that Judge Putnam dissented from the opinion of a majority of the Court in the case of the Metropolitan Steamship Company v. The British and North American Steamship Company, and that Judge Nelson was the District Judge whose opinion in that case was reversed. In reply it is sufficient to say, perhaps, that the two cases were before the Circuit Court of Appeals at about the same time; that Judges Putnam and Colt sat in both cases; that no reference is made in either opinion to the other case; that Judge Putnam dissented from the opinion of the majority in the Metropolitan Steamship case, so far as appears from the report thereof, (74 F. R. 320) not on the ground that he dissented from any principles of law laid down therein, but because he thought the burden of proof, being upon the appellant, had not been satisfactorily maintained by it. In conclusion it may be said that there is absolutely no inconsistency between the two decisions, each case being decided upon the peculiar facts and circumstances therein.

The third ground set forth by the petitioner is, that it was a fault on the part of the tug boat and barge to proceed up a narrow channel with such a long tow line. The evidence was conflicting as to what the length of the tow line was, the tug contending that the line was the ordinary length of harbor line, and offering testimony that it was the universal custom in Providence river and elsewhere on the Atlantic coast, and had been so for many years, to tow in and out of harbors with such tow line, and also that it was the safest and most prudent way in which to tow; also that there was no rule or regulation or law of any constituted authority anywhere forbidding such practice. The honorable Circuit Court of Appeals found the facts as contended for by the petitioner, and adopted the rule of law as laid down by the Circuit Court of Appeals for the Second District in the case of the Josephine B., quoted in their opinion from 58 Fed. Rep. 813, 816.

Towing on a tow line has been recognized as proper within the waters of the United States by this court. The Galatea, 92 U. S. 439, 446.

No decision of any court anywhere can be produced holding it to be negligence *per se* to tow on a tow line of the harbor length in the inland waters of the United States.

UNDISPUTED FACTS.

The iron, screw steamer, Berkshire, 260 feet long, 43 feet wide, drawing 14 feet 6 inches aft, and 11 feet 10 inches forward, left her wharf in Providence about 2.30 in the afternoon of August 16th, 1893, and started down the bay bound for Norfolk, Virginia. The weather was pleasant, the sea smooth, the wind light, and the tide more than half ebb.

Soon after, her engines were started up at full speed. Her captain was in the pilot house, in sole charge of the ship, with the quartermaster, who was, however, a new hand, never having acted as quartermaster before, and who observed nothing of what was going on, except that he kept his attention fixed upon the points given him by the captain from time to time.

When about Pomham, the captain noticed the steam towboat, N. & W. 1, with the barge N. & W. 4 in tow, down near Sabin's Point light house. The exact position of the tug and tow at this time is in dispute between the parties.

The steamer Bay Queen was coming up the bay, between Pomham and Sabin's Point, and blew one whistle to the Berkshire, signifying her intention to pass her port to port, to which the Berkshire replied with one whistle; and the steamers passed at or near the black buoy, No. 7, as delineated on the chart, in accordance with the signals given. At the time they passed each other, the Berkshire was near the center of the channel, a little, if anything, to the westward of the center.

After passing the Bay Queen, the Berkshire had a clear channel ahead, down to the tug and tow that were coming up, and which at this time were near to Sabin's Point light house.

The steam towboat, N. & W. 1, was bound to Providence with the barge N. & W. 4, in tow, towing behind on a hawser. The length of this hawser between the two vessels at the time of the accident is in dispute.

The master of the Berkshire states that he thought that the channel to the westward of Sabin's Point light was only about 300 feet wide; and that he thought the tug and tow, with the hawser between them, were so headed to the westward, across the channel as to occupy the whole thereof, and that he could not pass the tug and tow port to port for that reason, so he decided to attempt to pass them starboard to starboard.

No signal of any kind was given from the Berkshire. The master so directed her course as to attempt to pass between the tug and tow and the easterly shore. He continued at full speed, according to his statement, until he found there was going to be a collision (Luther E. Hooper, p. 89.) He then stopped and backed her full speed, giving one order immediately after the other. He did not do this, as he says, until immediately before the collision, and until he found that he was getting so near the easterly bank that the steamer would not go any further to the eastward, and that there was going to be a collision.

The master of the tugboat testifies that he passed Sabin's Point light house running as near the easterly bank as was safe, say within 400 feet of it, with the barge steering along behind, following the same course that he took; that when just below the Point he saw the Berkshire coming down the bay, having then just passed the Bay Queen, near the black buoy No. 7, with a clear space of water between the Berkshire and himself; he had slowed his speed before; that he blew one blast of his whistle to the Berkshire, signifying thereby his intention of passing port to port, and that he continued to hold his course on the easterly side of the channel, and as near the easterly bank as he could safely go, expecting that the Berkshire would pass him, in accordance with the signal that he had given, to the westward; and that it was not until the Berkshire was close upon him that he saw that a collision was imminent; that he then changed his course, put his wheel hard a starboard, and thereby barely escaped a collision between himself and the Berkshire, passing about 30 or 40 feet to the westward of the Berkshire.

The master of the barge also put his wheel hard a starboard, and attempted to escape in the same manner, but the effect of the reversing of the engines of the Berkshire, she having a right-handed propeller, was to throw her bow to starboard, and the result was that the bow of the Berkshire struck the starboard bow of the barge near her stem, and cut through her diagonally until she struck the port bow of the barge on the inside, about 40 feet abaft the stem on that side. The Berkshire then backed off to the eastward from the barge.

The testimony is conflicting as to whether she then passed down on the easterly side of the barge and rounded to under her stern and came up on the port or westward side of the barge on her return to Providence, whither she went, or whether she backed off to the eastward and then turned round and went back to Providence without passing around under the stern of the barge.

The barge immediately filled and sank in the channel a little to the southward and westward of the place where the collision occurred, which was nearly abreast of Sabin's Point light house, the tug being at the time the length of the hawser to the northward of that point.

An enlarged chart marked "Exhibit 1, M. W. S.," is filed in the case, which shows the location of the light and various points alluded to, the width of the channel and the depth of the water therein, and the location of the sunken barge as she lay after the colli~~sion.~~

It is claimed on behalf of the steamer Berkshire that the length of the hawser between the barge and the tug was from 80 to 90 or 100 fathoms long.

It is claimed on behalf of the tow boat that the hawser had been shortened some hours before the accident, at a point about opposite Bristol or Nayatt, to a length of 50 fathoms, which is stated by all as the usual harbor length of tow line.

A photograph showing the injury to the barge is in evidence marked Exhibit E, and a chart of Narragansett Bay marked Exhibit Z.

It is claimed on behalf of the steamer that no whistle was blown or signal given from the tug.

The points in issue between the parties which are disputed are very few. They are:

First. The length of the tow line, as to whether it was 50 fathoms as claimed by the tug, or from 80 to 90 fathoms as claimed by the steamer.

Second. As to the exact position of the tug and tow at the time when the captain of the Berkshire was at the black buoy, No. 7, and made up his mind, as he says, that the tug and tow were occupying the whole channel, and that he could not pass to the westward, but must attempt to pass them to the eastward.

Third. As to the width of the channel to the westward of the red buoy above Sabin's Point, and the waters between that and Sabin's Point light westward.

Fourth. As to whether the signal was or was not given by the tug as claimed by it.

Fifth. As to whether it is or is not dangerous to tow on a hawser, as was done by the tug in this case in Narragansett Bay.

Sixth. As to whether if the steamer had held her course at the last moment, without reversing her engines, she would not have cleared both tug and barge.

The faults claimed by the respective parties are as follows:

BY THE STEAMER.

1. In its libel against the tug and tow simply that the tug and tow were in fault in that the hawser line was too long.

2. In its answer to the libel of the tug and tow, that the tug and tow were in fault.

a. In proceeding up a narrow channel with a long tow line.

b. In proceeding across a narrow channel in such a way as to block the channel, when they should have kept right on up the channel.

c. In the barge not putting her helm to starboard.

d. In not keeping clear of said steamer Berkshire as required by law.

BY THE TUG AND TOW.

1. In their libel against the Berkshire, that the accident was caused by the negligence and unskillful management of the steamer.

a. In disregarding the signals of the tug and, contrary to law, attempting to pass to the starboard of the said barge.

b. In having attempted to pass on that side, and not keeping clear of said barge.

c. That she was proceeding at an undue and unsafe rate of speed, and did not slow down or reduce her speed and stop in time, in order to avoid a collision, which she might have done.

ARGUMENT ON THE DISPUTED FACTS.

FIRST.

As to the length of the tow line, and whether it was fifty fathoms, as claimed by the tug, or, 80 or 90 fathoms, as claimed by the steamer.

On this point we have the positive testimony of the captain of the barge, who actually measured the broken hawser after the collision, of the crew of the tug, who were accustomed to take in and let out this hawser several times on every trip of the tug, also the positive testimony of the crew of the barge. This testimony is corroborated by the testimony of numerous witnesses who were on the shore or on the bay at the time of the collision, and even by some of the Berkshire's own witnesses.

Briefly the testimony is as follows:

George Hayward mate on the barge, says: "Mate on the barge 18 months; the hawser was shortened about two hours before the collision, five miles below Sabin's Point, until we had only about fifty fathoms out." (Record, p. 155–156.)

John Neilson testifies to the same effect. (Record p. 164.)

John Elies says: "It was about the length of the barge between the tow boat and the barge." (Record, p. 169.)

Charles F. Burnett, captain of the barge a little over three years, says: "Hawser was shortened a little over six miles below Sabin's Point. Hawser had all been out and was all wet. Measured the hawser on board the barge after the collision and found 310 feet. Hawser was hauled in to the usual length of towing into harbors—about fifty fathoms. We always shorten in going into harbors until we get about fifty fathom—that is the general custom. Could not make it any shorter, because the barge would be liable to sheer. Customary to tow with this length of line into Boston, Portland, New Haven, N. Y. Harbor, up the narrows and through Hell Gate." (Record, p. 174, 175, 184, 187.)

Harry L. Simpson, chief engineer of the tug, and who was on board the barge at the time of the collision says: "Along off Bristol somewhere they started to shorten the hawser on the barge, the donkey engine on the barge gave out and broke down, and then they took the hawser in our capstan on board the tug, shortening it up to the usual length of our tow line. . . . . That was, I should judge, about a length and half of the barge N. & W. 4, (the barge is 210 feet long), ... the length we were in the habit of towing with, in all harbors we go into, Norfolk, New York, Hell Gate, New Haven, Providence, Boston, Portland." (Record, p. 191, 192.)

Captain O. S. Baker of the tug says: "Have been captain of towing steamer since 1871, and of this tug since built, 4 years ago. Off Bristol we started to shorten up the hawser, and the barge took in some, I don't know how much, one-third, perhaps, or more, and then signalled that her engine had broken down and that she could not haul any more. We put the hawser on our capstan and hauled it until we got the usual length of harbor tow line—we had out then fifty fathoms—no change was made from that until the time of the collision. This is our usual harbor length, and that is about the length that other people use for that size tow. We have towed into New York and through the Gate, New Haven, Providence, New Bedford, Boston, Salem and Portland." (Record, p. 207, 208.)

John Farrell, mate on the tug, says: "I have been seven years on steam vessels, and two years on this tug. Began off Bristol to shorten hawser; they got part of it in on the barge, and then their machinery broke down, and we took in the balance of it on our boat, shortened it up to about 50 fathoms, the usual length that we use in going into all harbors, and that all others in my observation use. It is the same length as is used in going into New York, through the Gate, New Haven, Providence, Boston, Norfolk, and in fact all harbors." (Record, p. 224.)

W. L. Armstrong, second mate on the tug says: "Have been on steam vessels four years and a half, and on this tug three years. Started to shorten hawser down off Bristol, Barge windlass broke down, and we finished shortening on our own windlass, left the hawser when we got through shortening it, about twice the length of the tug, tug is 135 feet long, about 45 to 50 fathoms, the ordinary length of hawser in towing into harbors, what we always have in going into New York, Boston, New Bedford, New Haven, Portland." (Record, p. 231.)

Thomas Benson, sailor, on tug eight months, says, "They started to shorten up the hawser on the barge, and when they got in about half of it their windlass broke down the barge's windlass, the captain told us to hitch the hawser to our windlass and bring in the rest of it, and we hauled until the captain told us that that was enough—then the shortest hawser we use in going into harbors—I should judge it was about twice the length of the boat — the usual length." (Record p. 233.)

John H. O'Rourke, fireman on tug, says, "Shortened hawser down near Bristol. When got through shortening had out about twice the length of the tug—about the ordinary length for towing into harbors." (Record, p. 235.)

Mose Blair, fireman, "I look out of the fire-room and saw them shortening hawser, when they got it shortened it was about twice the length of the tug or once the length of the barge. I should judge it was about the same length as usual." (Record, p. 237.)

Joseph Ardita, sailor on tug, "The hawser was shortened the same as when going into New York, Providence or Boston. It was about as long as the barge." (Record, p. 229.)

Byron Cheney, spectator on the shore, puts the barge and tug between three hundred and five hundred feet apart when he first noticed them, this was after the crash, and the hawser had been parted. Record, p. 243.

John Very, who was also on the shore, says they were about 350 feet apart. Record, p. 245.

Charles Simmons, spectator on the shore, puts them between 200 and 300 feet apart. (Record, p. 250.)

Thomas Smith, oysterman, in a small boat off near the light-house when tug and tow went by, says, "I should think the hawser was 300 to 310 feet long." (Record, p. 255.)

Michael McLaughlin, oysterman, also in a small boat with

Smith, says, "I should think the hawser was 300 feet long." (Record p. 259.)

Charles H. Penno, a spectator, who was fishing just below the Pawtuxet beacon, and who saw all the vessels before the collision, the collision, and the movements of those left after the collision, and who tells the story of this collision with absolute correctness, and just as it occurred, gives the length of this hawser as about 300 feet. (Record p. 263.)

Peter McLaughlin, oysterman, was out in a small boat to the northeast of the lighthouse, about a quarter of a mile away. He says, in regard to the length of the hawser, "I should judge it was about 300 feet, it might be longer and it might be shorter, but it would not be a great deal either way." (Record p. 270.)

Albert R. Nickerson, police officer, saw them from the Pawtuxet side, from R. I. Yacht Club house, says, "The hawser was about 250 feet." (Record p. 277.)

Captain Richard B. Gibbs, called by the Berkshire, and who was near by at the time of the collision, says, "I should think the tow line was about fifty feet longer than the Berkshire." (Record p. 108.)

Captain Spooner, also called by the Berkshire, and who passed both tug and tow on the way to Providence before the accident occurred, says, "I should think it was over 200 feet." (Record p. 110.)

Walter David Nye, passenger on the Berkshire, and called by the owners, says, "I was standing beside the pilot house, port side, facing forward—I noticed it was a long distance—I showed the distance to the lawyer down at the wharf this morning and he supposed it to be about 300 feet. (Record p. 130.) In estimating this distance I pointed out an object on the dock, and said it was about as far from where I stood to that point, and Mr. McClockey said if the Chatham was lying along there her bow would not reach to the object I had named, and she is 240 feet long. Mr. McClockey is the agent of the line." (Record p. 132.)

James Pratt, engineer on the Berkshire, says: "She had a 90 fathom line out." (Record p. 45.)

Thomas J. Keough, second mate on Berkshire, says: "I could not tell exactly; should say 80 fathoms." (Record p. 65.)

Peter Keine, who was acting as quartermaster for the first time, and was in the pilot house of the Berkshire, says: "I could not tell exactly the length of the hawser. It might have been between 90 and 100 fathoms. (Record p. 76.) The captain *says it was a very large hawser*. He asked me if I did not think it was. *When he asked me about it he told me he thought it was about 90 or 100 fathoms long*. First looked at it when we struck. Did not see any hawser then. I think the hawser was cut, because she was towing the barge on a hawser and we went where the hawser was. . . . Whether the tug was a quarter of a mile off at the time does not make any difference." (Record p. 80–81.)

It does not require much skill to discover where Keine got his idea of the length of this hawser.

Captain Hooper of the Berkshire says: "From the looks of the hawser it seemed to me about 100 fathoms long." (Record p. 90.)

Moses B. Rich says: "I don't mean to swear positively, think about 100 fathoms; I just cast my eye over it when I seen them coming up and thought it was about that long." (Record p. 105.) "You could not tow with less than fifty fathoms a barge of that size." (Record p. 106.)

Horace M. Carr says: "I don't know; I should judge it was 500 feet; should think it was 75 fathoms or more." (Page 114.)

This man's idea of distance is shown by his testimony in regard to the distance from the black buoy above Sabin's Point to the lighthouse. (Record p. 117.)

Thomas Callahan, 90–100; John Nevil, 100–125; Sidney Cornell, 100, and Frank Rockwell, 500–600 feet; all called by the Berkshire think the hawser was about 100 fathoms long, while—pp. 81–119–123–126, Frank P. Barrows says: "It was three times the length of the Berkshire." (Record p. 139.)

William Flannagan says: "I should say it was about 75 or 80 fathoms. I should guess about that." (Record p. 144.)

Henry Miller says: "It was two and one-half times the length of the Berkshire." (Record, p. 152.)

This is all the testimony on both sides in regard to the length of the hawser.

Can there be any doubt that the positive testimony of these witnesses from both barge and tug, who were accustomed to shorten this hawser several times on every trip, and who swear positively as to its actual length, and say that it was shortened on this occasion as on all other times of going into a harbor—to its usual length—is correct when it is corroborated by witness after witness on both sides of the bay, and in effect by many of the witnesses of the Berkshire also?

The witnesses for the steamer, who testify to the length of the hawser, of course, are all testifying to a mere guess, and a mere guess made from a distance, and in most cases made long after the event.

A glance at the chart, Exhibit 1, and the position of the sunken barge, will also show that this hawser was of the length testified to by the tug.

At the instant the collision occurred the red buoy above Sabin's Point was about 100 to 125 feet off the starboard bow of the tug to the northward—she at that time not being quite up to it—at the same time the stern of the barge had cleared the light house, so that witnesses at cross range on the shore could see between the barge and the light house. See testimony of Byron E. Cheney, p. 243; John Very, p. 245; Charles Simmons, p. 249; Thomas Smith, p. 255; Charles Penno, pp. 264–265; Peter McLaughlin, p. 270; Albert R. Nickerson, p. 277.

All the testimony is that the barge drifted, after being struck, something from once to twice her length southward and westward before she settled on the bottom—that is the way the tide would set her. The actual distance by survey from the sunken barge to the red buoy is something less than 800 feet. The barge is 210 feet, the tug is 135 feet, and the hawser 300 feet. Placing tug, hawser and barge of these dimensions in the positions they actually occupied when the collision occurred, and it will be seen that they occupy the exact position with relation to the red buoy and light house testified to by these witnesses.

SECOND.

As to the exact position of the tug and tow at the time when the captain of the Berkshire was at the black buoy No. 7, and made up his mind, as he says, that the tug and tow were occupying the whole channel, and that he couldn't pass them to the westward but must attempt to pass to the eastward.

All the testimony in this case shows that the Berkshire and the Bay Queen met and passed each other at or near the black buoy No. 7, above Sabin's Point light house, and the testimony of every person in a position to know anything about the fact is, that at that time the tug was not quite up to the light house, and that the barge was the length of the hawser directly behind her, and that both tug and barge were then on the easterly side of the channel near to the easterly bank.

George Hayward, on the barge, says:

Q. When this whistle was given, where were the tug and tow?

A. Just below the light house.

Q. When you came out and saw her (the Berkshire) there near the black buoy, where were the tug and tow?

A. Very nigh abreast of the light house.

Q. The tug was?

A. Yes, sir.

Q. Whereabouts, on which side of the channel were the tug and tow?

A. On the eastward side.

Q. Both of them?

A. Yes. There was too-thirds of the water to the west of us. (Record, p. 156, 157.)

John Neilson, sailor on the barge, says:

Q. Whereabouts was the tug in the river?

A. The tug was right ahead of us.

Q. Whereabouts with reference to Sabin's Point light house?

A. A little below.

Q. Did you see the Berkshire at this time?

A. Yes sir, ahead of us in the river about half a mile off. (Record, p. 165–168.)

"I knew we were on the east side of the channel, the tug was right ahead of the barge, she was on the east side, too." (Record, p. 168.)

John Elies, who was at the wheel of the barge, says: "When the tug gave the signal she was just about the light house—just passing the light." (Record, p. 170.)

Charles F. Burnett, captain of the barge:

Q. Where was the tug when she signalled?

A. A little south of Sabin's Point light.

Q. Where was the Berkshire when you first saw her?

A. Pretty well up above the black buoy, near the other light, Pomham; could not locate her exactly, head on, you know. (Record, 175.)

Q. How close to the light house did she (the tug) run?

A. I might say 500 or 600 feet with safety.

Q. How was your barge steering, with reference to the tug?

A. Steering directly after her.

Q. Which side of the channel?

A. On the eastern edge of the channel. (Record, 176.) We were going up on the east side. (p. 58.)

Harry L. Simpson: "She was somewhere very close to the light house—she must have been right abreast of the light house. I saw the Berkshire, she was about half a mile ahead of the tug boat coming down. (Record, p. 193.)

Captain O. S. Baker, of the tug, says:

Q. Did you afterwards that day give any signal to the Berkshire?

A. Blew one whistle. After I sighted the Berkshire we were about in the center of the channel, and I sighted the Berkshire nearly abreast of that black buoy, and I ported the wheel to take the starboard side of the channel, and slowed up.

Q. Did you continue at that speed until after the collision?

A. After we had ported and run some way *and got over* *on that side of the channel*, we blew one whistle—that is the signal to pass to starboard—port sides to port sides." (Record, pp. 208, 209.)

"We blew the whistle when down below the light—*a distance of half way from that black buoy below to the lighthouse everything was straightened up behind us and we were on the easterly side of the channel.* He was then three-quarters of a mile away and had just passed the Bay Queen, port to port—he was on the westerly side of the channel." (Record, p. 222.)

John W. Farrel, mate of tug, says: "As we approached we blew our whistle—we were going on to the east side and were very near up abreast of Sabin's Point Light—the Berkshire was somewhere in the vicinity of the black buoy—not quite to it I should judge—about one-half mile from us. I should judge she was over pretty well towards the black buoy—towards the western side of the channel. We were about 600 feet from the light and the barge was steering right along after us." (Record, p. 225, 226.)

Thomas Benson says:

Q. Did you hear the tug blow?

A. Yes, sir; blowed one whistle.

Q. Where was the boat then?

A. She was not quite up to the lighthouse. (Record, p. 234.)

John H. O'Rourke says:

Q. Did you know anything about any whistle being given by the steamer?

A. Yes, sir; we blew one whistle.

Q. Where were you when you blew that?

A. Going on toward's Sabin's Point Light.

Q. Just below the light?

A. Yes, sir. (Record, p. 235, 236.)

Q. How far was she away?

A. When we blew the whistle?

Q. Yes.

A. I guess nearly half a mile. (Record, p. 236.)

Mose Blair says, "There was one blast from the tug." (Record p. 239.)

Joseph Ardita says :

Q. Did you hear any whistle that day from the tug?

A. Oh, yes.

Q. What whistle did you hear?

A. A long one.

Q. One whistle?

A. Yes, a long one.

Q. Did you look to see where you were then?

A. Yes ; I see the Berkshire coming.

Q. How far off was the Berkshire when you gave the whistle?

A. A half a mile. (Record p. 239.)

Thomas Smith says :

Q. What is your business?

A. Oysterman.

Q. Did you see the accident between the barge and the Berkshire last summer?

A. Yes, sir.

Q. Where were you?

A. Right opposite the stake where the tug blew. I was in the boat with Mike McLaughlin.

Q. You were in the boat with Mike McLaughlin right opposite where the tug blew?

A. Yes, sir.

Q. Where is that stake?

A. I could not tell you exactly how many feet from the light-house.

Q. In which direction?

A. Down towards Bullock's Point.

Q. To the southward?

A. Yes, sir ; I guess it is.

Q. How many times did she blow?

A. She blew once.

Q. One blast?

A. Yes, sir.

Q. How far were you from her when she blew?

A. I should judge about one hundred yards.

Q. Did you see the Berkshire at that time?

A. Yes, sir.

Q. Where was she?

A. Just about the black buoy.

Q. Up the river?

A. Up the river, coming down.

Q. Had she passed the Bay Queen at that time?

A. Yes, sir; just passed the Bay Queen, between the black buoy and the red buoy.

Q. Did the Berkshire answer the blast?

A. No, sir.

Q. Had you noticed at that time the barge coming along behind the tug?

A. Yes, sir.

Q. How long was the hawser?

A. I should judge about three hundred and ten feet, some where along there.

Q. What part of the channel were they in?

A. To the eastward of the lighthouse.

Q. To the eastward of the lighthouse? That is towards the light?

A. As near the light as they could.

Q. They were on the easterly side of the channel?

A. Yes, sir. (Record pp. 254, 255.)

Michael McLaughlin—The tug and the tow were on the east side of the channel when they passed me—they were coming up, I should think, on the east side. The Berkshire was then up near the black buoy coming down: could not say exactly which side she was on—the Bay Queen was east of her at the time. Record p. 259.

Charles Penno says in relation to the position of the tug and tow immediately after the signal was given by the tug: "When she was abreast of me there I didn't notice in particular; but when she got up to the lighthouse she was on the east side of the channel, I should say. When the Berkshire was up at the black buoy she was in the middle or possibly to the west side of the channel." Record p. 263.

Peter McLaughlin says—"The tug was 200 to 250 feet below the light when she blew ; the Berkshire was just in the range of the black buoy above." Record, p. 269.

Albert Nickerson says—" I heard whistles blowing and I looked up—don't know who blew them. I saw the Berkshire then passing the black buoy about in the middle of the channel. I saw the tug and the tow coming up on the east side below Sabin's Point. I saw the river boat and the Berkshire pass each other, and I saw the tug and tow going up ; the barge and tug were on the east side, hugging the east side. I saw the Berkshire change her course. She was coming down on the westward side, and she changed and came over to the eastward side ; and I said to myself, How is she going to get inside of the barge between her and the light-house ? I thought to myself she was going to hit, and she did hit." Record, p. 273, 274.

Louis L. Budlong says—" When I first saw the Berkshire she was about 500 feet north of the red buoy above the light-house towards the black buoy on the east side of the channel. The tug and the tow were also on the east side of the channel." Record, p. 280.

Captain Hooper testifies that " Just as he was passing the Bay Queen the tug was about crossing his bows ; she was just then off Sabin's. I told the quartermaster to starboard the wheel. I saw there was no earthly chance for me to go to the westward of the tug ; he had taken up the whole of the channel—(see Exhibit B, L. E. Hooper)—*which is there only about 300 feet wide. If I could have gone to the westward I would have gone there.* That is all I did. I steadied my wheel then ; told quartermaster to starboard, and of course I went as close to Sabin's Point as I could go to the bank." Record, pp. 88, 89.

On cross-examination he says—" I looked at the tug and thought to myself the tug is going to make a turn, and then I just kept to the eastward. I saw there was no room to pass. A tug going around a point like that has got to proceed some distance in order to get her tow around. I knew she would have to swing over that way, *but I thought there was room enough to go to the eastward. If I hadn't thought there was room enough to go to the eastward I would have slowed down.*

I found out I could not pass the barge when 200 yards away from her. When I first noticed the tug before the collision I suppose she was 150 feet to the westward of Sabin's Point, and by the time I got up to her she was across the channel about 300 feet. *If the channel had been 600 or 800 feet wide, there would have been ample room to go to the westward. But it is only about 300 feet wide*—(Record, pp. 95, 96). I never use any chart in running Providence river. I can run it without a chart. I know where the best water is. I never take the chart out to run the river by it. It is buoyed out." Record, p. 103.

The very evident lack of knowledge on the part of Captain Hooper of the width of the channel and of the course which the tug would be obliged to take, when he himself was about at the black buoy and the tug was apparently 150 feet westward of the light, and the navigating of his ship on the supposition that the channel was only three hundred feet wide, and that at that time the whole of it was taken up by the tug and tow, and that he could pass down under the stern of the barge, to the eastward, put the Berkshire in a position where, on account of the way he managed her afterwards, she was bound to strike either the tug or the barge.

This was his error and caused the collision. He should have known that the tug and tow were all the time on the easterly side of the channel, and that when the tug reached the red buoy she would make a short turn to the northeast, and he should have kept to the westward. Instead of so doing, however, he, while on the westerly side of the channel—running full speed—put his wheel to starboard and crossed the channel, and passed within a very short distance of the red buoy, and then being about 600 feet from the barge he discovered his mistake and that he could not pass to the eastward of the barge. He immediately stopped and reversed his engines, and kept them reversed, this turned his bow towards the barge, and together with his speed and the proximity of the bank caused the collision.

Had he been running slowly, as he should have been, then there would have been no such pressure from the bank, and his ship would have answered her starboard helm, for there was water enough to the eastward for him to have passed in safety, had he made no other mistake. Even running as he was, if he had stopped his engines, and not reversed, he might possibly have struck a glancing blow without serious damage. But if he had not been grossly ignorant of the channel he would not have pocketed his ship in any such manner. He says *if the channel was 600 or 800 feet wide he could certainly have gone to the westward and would have done so.* Just below the black buoy, away over toward the Pawtuxet side, there was ample water for his *ship for more than three times 600 feet.* There are no buoys on that side at the bend opposite the red buoy, showing that it is all channel down to Pawtuxet Beacon, and that is the course he should have taken.

The quartermaster he was breaking in knew nothing of the channel, but steered as the captain directed him from time to time.

The captain of the Berkshire alone is responsible for this accident.

THIRD.

As to the width of the channel to the westward of the red buoy above Sabin's Point and the waters between that and Sabin's Point Light to the westward.

George Hayward watched the wreck for several weeks. He says there was water enough to the eastward of the barge for him (the steamer) to pass, and there was two-thirds of the channel to the westward. There was nothing to prevent the Berkshire going to the westward in accordance with our signal. Record, pp. 158, 159. "I have seen tugs and tows going up westward of where the barge lay on the bottom. Saw a tug and two barges go up there 500 feet to the westward of where she lay." Record, p. 160.

Charles F. Burnett—There was plenty of room for her to have gone to the westward of us—or to the eastward. I have observed steamers going up and down the river while the barge was sunk and I was on the wreck, and the regular course was westward of where she lay. (Record, p. 179.)

Captain O. S. Baker testified as follows:

Q. Are you acquainted with the channel down there?

A. Yes, sir.

Q. How much water was there to the westward of your tow, in width, for a vessel drawing 15 feet of water—the extreme depth of the Berkshire?

A. At that point the channel is about 1200 feet wide, and we were 400 feet from the light, which would give them 800 feet to the west clear water. The barge was, I should say, to the eastward of the centre of the channel.

Q. So that there was more than half the channel to the west of both the tug and the barge all the time for the Berkshire to have taken, was there?

A. Yes, sir. (Record, pp. 210, 211.)

John W. Farrel says: "I am familiar with the channel down there; there was plenty of water for her to have passed to the westward of us at all times. I don't think the barge was ever westward of the center of the channel, if anything she was to the eastward of the channel—the tug never was to the westward. Both tug and barge were to the eastward of the channel all the time." (Record, p. 227.)

John Very testified:

Q. Do you know how wide the channel is down there?

A. You might say it is all channel right up to the boathouse; there is deep water that runs in there about a quarter of a mile, just above the light house, till you get abreast of the boat house, one-quarter of a mile wide, up to the Pawtuxet boat house (Yacht Club). There is water all the way up as much as a quarter of a mile wide. (Record, p. 245.)

Charles Simmons:

Q. Do you know how wide the channel is there?

A. It is pretty wide, the channel is.

Q. How wide?

A. 1,000 feet, I should say—as much as that. I am familiar with the river there. I have been there for 20 years, that is around Sabin's Point. (Record p. 250.)

Charles Penno says: "We consider that the red buoy is one line on the east side of the channel, and the other extends over to the beacon—the old Pawtuxet beacon on the west side. That is generally the accepted opinion of the channel there." (Record p. 265.)

Peter McLaughlin says: "If the Berkshire had held her course and not turned, I think she would have passed the barge, there was water enough. I am familiar with the channel, I have been working on that Point for 20 years. I would not say exactly how wide the channel is from Sabin's Point to the west side, but it is somewhere about 900 or 1,000 feet there. There is deep water all the way over except about 50 or 60 feet outside the lighthouse, all the rest of it is good deep water. She could have gone to the westward as there is better water and more of it, too. (Record pp. 270, 271.)

Albert Nickerson says: "I am familiar with the channel down there. I should judge there was ample room for the Berkshire to pass to the westward of the tug and tow—that is where I thought she was going. I did not see how she could get on the inside. I should think the width of the channel is 800 to 1,000 feet—perhaps wider. It is good deep water, *because right there there are no buoys.* There is the Pawtuxet Beacon on the west side; then there is Sabin's Point Light; and up there (to the north) is a black buoy, *and up here* (to the northwest) *there are no buoys at all, and where there are no buoys you are supposed to give the shore a fair berth, that is all. The barge and tug were hugging the east shore at the Point.* (Record p. 275.)

Louis L. Budlong—"Don't know the width of the channel exactly, but I should judge it was 800 or 900 feet wide there —it may be more than that." (Record p. 280.)

John F. Weeden, lighthouse keeper at Sabin's Point for the past nineteen years, says in regard to the width of the channel—"I know where the channel is; the width of the channel westward from the lighthouse is 1,100 or 1,200 feet; from the red buoy it goes in a long way. I was there and assisted Mr. Schofield in making the soundings—(see Exhibit 1 M. W. S.) The red buoy is supposed to be in 15 feet of water, *and there is no black buoy opposite it.*" (Record p. 281.)

Captain N. W. H. Sutton testifies that he has done towing in Narragansett Bay for the past thirty years; that the width of the channel for a vessel drawing fourteen or fifteen feet of water in that part of the bay which lies westward of the red buoy north of Sabin's Point and west of Sabin's Point Light itself is from 1,000 to 1,500 feet—nearer 1,500 feet than 1,000—(Record p. 284)—mean to say that there is from 1,000 to 1,500 feet of water in width that such vessels can go in. (Record p. 290.)

Captain William J. Bartlett, master of tug-boat, been towing to Providence four years—"I saw the spars of the sunken barge and passed her drawing a barge which drew nineteen feet of water. I passed her on the westerly side by probably fifty feet; and from my knowledge of the channel I was then right in mid-channel—to the best of my judgment fully half of the channel being to the westward of me at the time. Passed the sunken barge probably four or five days after she was sunk." (Record pp. 299, 300.)

Abel L. Huntley says—"I am master of tug-boat, and in and out of Providence at least once every two weeks for the past three years. I am familiar with the channel at Sabin's Point Light. At low water, for a vessel drawing fourteen feet six inches, from the red buoy down to the lighthouse to the westward the channel is not less than 1,500 feet wide." (Record p. 303.)

Captain John D. Beckwith, master of tug-boat seven years, thirty-five years running through Long Island Sound, to Providence, last fifteen in the towing business, and licensed pilot sixteen years. (Record p. 310). "The width of the channel for vessels drawing fifteen feet between Sabin's Point and Pawtuxet Beacon—I should say that that distance across there was about one-fourth of a mile—one-fourth of a nautical mile, I mean—which would be about 1,500 feet or a little over. After you get below the black buoy No. 7, above the lighthouse, there is a big bight makes in towards the Pawtuxet club-house of good deep water. I saw the barge N. & W. four days after she was sunk, and there was five-eighths of the channel to the westward of her as she lay there; she was considerably to the eastward of the center of the channel." (Record p. 313.)

Mark W. Schofield, a civil engineer and land surveyor, was employed to make an actual survey of the place where the collision occurred, the position of the sunken barge and the width of the channel westerly of a line drawn through the red buoy above the Sabin's Point lighthouse, to the lighthouse itself.

This he did on August 23d and 25th, 1893, by making actual measurements and soundings himself.

The result of his investigation he indicated on a chart marked M. W. S., Exhibit 1, which is the U. S. Government chart of this portion of Narragansett Bay, enlarged to a scale of 400 feet to the inch.

(See testimony of Mark W. Schofield, Record, p. 240, 241, 242.)

This testimony is wholly uncontradicted, but is corroborated in every particular by the witnesses called by the appellees.

It is uncontradicted by any witness of the Berkshire, except Captain Hooper, and he says the channel is only about *300 feet wide* (p. 89), and again at p. 98 he says the channel at this point is only about *250 to 300 feet wide.*

John Nevil, the only other witness for the Berkshire, thinks it may possibly be 100 fathoms in width (p. 120). The remainder of them know nothing about it.

FOURTH.

As to whether the signal (one blast of the whistle) was or was not given by the tug as claimed by it.

George Hayward says, "I heard the whistle of the tug—one long blast—came on deck and saw a steamer up the river, coming down, which subsequently proved to be the Berkshire. When this signal was given tug and tow were just below the light house. I never heard any answer. (Record, pp. 156, 157.)

John Neilson—"Heard whistle of the tug before the collision—heard one long whistle—was on deck when it was given, tug was then a little below Sabin's Point lighthouse. Saw steamer Berkshire ahead of us in the river about half a mile off. She didn't answer our whistle. I didn't hear no whistle." (Record, p. 165.)

John Elies—"Heard the tug give signal with her whistle—one blast—tug was then just about abreast lighthouse. Berkshire did not answer." (Record, p. 170.)

Charles F. Burnett—"Heard the tug give signal with her whistle when she was a little south of Sabin's Point light—she gave one long blast. I looked up the river and saw a steamer coming down—I didn't know what it was, it subsequently proved to be the Berkshire. I didn't hear any answer to this signal - should have heard it without doubt if she had given one." (Record, pp. 175, 189.)

Harry L. Simpson—"Heard the tug give signal—one blast—she was close to the lighthouse, very nearly abreast of it. The Berkshire was then about half a mile away coming down." (Record p. 193.)

Captain O. S. Baker testified:

Q. Did you that day give any signal to the Berkshire?

A. Blew one whistle.

Q. Where were you when you gave that whistle?

A. We were then a little more than half way from the black buoy below Sabin's Point up to the light—and a little to the eastward side of the channel. The Berkshire was then about the black buoy above Sabin's Point. She seemed a little on the starboard side of the channel as she had just passed some other steamers.

Q. Did she answer your whistle?

A. No, sir.

Q. At no time?

A. At no time.

Q. What course did you steer?

A. We kept holding to starboard on the east side of the channel, as close as we dared and to keep our barge from going aground. We passed, I should judge, 400 feet from the lighthouse. (Record pp. 208, 209, 210.)

Cross-Examination.

Q. From all you could learn the Berkshire didn't hear your signal?

A. I don't know anything about that. Before we blew our signals the Berkshire and another vessel passed each other. We heard both of these signals distinctly, and we waited until that sound had all died away, so that there could be no conflict with our signal, before we blew our blast. (Record p. 216, 217.)

If he had answered my signal or given me any danger signal soon after he got mine, I could have gone the other side of the river. (Record, p. 221, 222.)

John W. Farrel says: "I saw her pass the Bay Queen, saw the signals exchanged between them, saw the escape of steam and heard the signals exchanged, one blast each; they passed port to port; after they passed saw the Berkshire on the westerly side of the channel, near the black buoy, then gave her one blast of our whistle which signified to keep to starboard, pass port to port, the same as the other steamer had. She was then about one-half mile off; she did not answer our signal; it was all clear between us and the Berkshire, there was nothing in the way." (Record, p. 225, 226.)

Thomas Benson says: "I heard the tug blow one whistle. I was on the port side just going down below. I was about amidships when the whistle blew. The tug was not quite up to the lighthouse. I don't know where the Berkshire was, I did not see her. I did not hear any answer to the whistle." (Record, p. 234.)

John O'Rourke: "The tug blew one whistle when we were going on toward Sabin's Point, just below the light. Did not hear the Berkshire give any answer. She was, I guess, half a mile away." (Record, p. 235.)

Mose Blair: "I heard one blast from the whistle of the tug. Cannot tell exactly how long before the collision." (Record, p. 239.)

Joseph Ardita says: "I heard one whistle from the tug. I looked up and saw the Berkshire coming; the Berkshire was half a mile away. She did not answer the whistle." (Record, p. 239.)

John Very, who was on the shore, says: "I noticed the tug and tow coming up the river, and the next thing I heard was the tug blowing a long blast. She was just opposite the stake that the Continental boats round in coming up to the wharf, (about 500 feet south of lighthouse.) The tug blew one blast. I looked out then to see what was in the river, but did not see the Berkshire as the view up the river is cut off by a shed on the Point. I did not hear any answer to the blast of the tug from the Berkshire nor any one else." (Record, p. 244, 248.)

Thomas Smith: "Saw the collision between the Berkshire and the barge. I was right opposite stake (where the Continental boats turn into Pleasant Bluff) where the tug blew. I was in the small boat with Mike McLaughlin. I was right opposite where the tug blew. I could not tell exactly how many feet that stake is from the lighthouse—it is to the southward, down towards Bullock's Point. She blew once. I should judge I was about 100 yards from her when she blew. I saw the Berkshire at that time, she was up the river, just about the black buoy, coming down. She had just passed the Bay Queen between the black buoy and the red buoy. The Berkshire did not answer the blast. Tug and barge were on the easterly side of the channel, as near the lighthouse as they could." (Record p. 254, 255.)

Michael McLaughlin, oysterman: "Was in the boat with Thomas Smith when the collision occured between the Berkshire and the barge. Pretty close to the stake where the Continental boats turn, noticed the tug and tow go up. I heard her blow one long whistle, a good sound blast. Q. Did she get any answer from anywhere? A. No, sir. I looked up the stream to see what was coming and saw the Berkshire coming down by the black buoy." (Record, p. 259, 261, 262.)

Charles Penno: "I was fishing in the general direction south from Pawtuxet Beacon, when this collision occurred.

I heard one loud, full blast from the whistle of the tug. She was then abreast of me to the east. The first thing that my attention was called to was that loud full blast of the tug when she was off abreast of me, and I looked up and saw the tug, and then I looked instantly up to the north in a general direction, to see what she was whistling to, and I saw the Berkshire. She was up about at the black buoy. She made no answer whatever to the whistle of the tug." (Record, p. 263, 268.)

Peter McLaughlin, oysterman, says: "I saw the collision between the Berkshire and the barge. I was about one-quarter of a mile northeast of the spot raking oysters on the bed. The first I heard was a loud whistle, and that was below the light house. I looked up and saw the steam escaping from the tow boat at the same time as the whistle. I looked up the river, and northwest from where I was I saw the Berkshire coming down and the Bay Queen going up to the city, just in range of the black buoy from where I was. I could not hear any answer from the Berkshire. I was nearer to the Berkshire than to the tow boat, and if she had answered it I should have heard it." (Record, pp. 269, 272.)

This is the testimony of witnesses called by the tow boat. To contradict it the Berkshire called James Pratt, engineer on Berkshire. He says: "I did not hear any whistle from the tug—think I could hear them if they had been blown." (Record, p. 45.)

Peter Keine: "Did not hear any whistle from the tug—did not see any steam escape out of her whistle." (Record, p. 76.)

Captain Hooper of the Berkshire: "No signal blown from the tug to us. WE DID NOT BLOW ANY WHISTLE TO THE TUG. I did not hear any whistle from the tug. No other vessel near us. Petrel was behind; don't know how far." (Record, pp. 92–96–97.)

Richard B. Gibbs says: "The tug might possibly have blown and I not hear it." (Record, p. 107.)

Captain Joseph H. Spooner says: "Met Berkshire about half way between Sabin's Point and the black buoy; exchanged whistles with the Berkshire AND AFTER THAT I HEARD ANOTHER WHISTLE BEHIND ME—IT WAS A LONG BLAST. Berkshire was on the west side of the channel when we met." (Record, p. 111.)

Horace M. Carr: "Didn't hear any signal; think I would have heard it." ((Record, p. 114.) This witness says he was an eighth of a mile away—he was actually over a mile and coming up to the city.

Frank Rockwell says: "I heard one whistle; could not say which one blew it." (Record, p. 127.)

The testimony of all these witnesses of the Berkshire is negative testimony—they did not hear the tug—they think they could or would have heard her had she blown—and that she might have blown and they not noticed it. Against testimony of this character, the tug boat has introduced the testimony of the man who blew the whistle and of witnesses who both heard the tug blow, saw the escape of steam from her whistle, and who also noticed that the Berkshire did not answer the signal. These witnesses are corroborated by the testimony of the captain of the Berkshire that he gave no signal. It is unreasonable to suppose that the remainder of their testimony is false.

FIFTH.

As to whether it is customary and whether it is or is not dangerous to tow on a hawser as was done by the tug in this case, in Narragansett Bay.

On this point the testimony is all to the effect that it is the universal method, all along the seaboard and into all the bays and harbors of the United States, to tow in this manner, and that there is no law, rule or regulation against it anywhere.

Berkshire's own witnesses, the captains of the excursion boats which ply in the bay, all testify to its being done countless times every day in the year within their knowledge

—it being rarely that a barge is taken alongside, and then only for some special reason applicable to that vessel alone.

See testimony of Captains Rich, p. 105; Spooner, p. 112; Gibbs, p. 109, and Carr, p. 117.

The witnesses summoned by the towboat on both tug and barge testify to the universal use of this method of towing in the bay, and their testimony is backed up by the testimony of Captains N. W. H. Sutton, p. 282; Walter Sutton, p. 291; the local towboat men, and Captains Bartlett, p. 297; Huntley, p. 302; and Beckwith, p. 310, representing some of the largest towing transportation lines on the eastern seaboard, as to its universal use elsewhere.

This is the strongest possible testimony that it is the best method and least dangerous method of towing.

All these towboat captains are experts, who are sailors and captains every day in the year, instead of only two months, and the remainder of the time following some other business. They testify positively that it is safer for the tug, tow, and shipping to tow in this manner. That the tow is under better control, can change her position more readily and in shorter time, will steer better and will take up less of the channel, if it be narrow, when on a hawser, than when alongside.

The Berkshire has attempted to throw a cloud on this testimony by asking these witnesses why the hawser is shortened from the sea-going length when coming into any harbor, and they all give the reason, and the only reason, that it is on account of the LENGTH of the channel which would be taken up by the tug, hawser and tow, which would, in crooked and narrow water-ways, interfere with sailing vessels beating out of such waters.

This seems to be a perfect reason for shortening the hawser, though it may also be added that there is always more room, and that it can be more conveniently done before entering a harbor than when actually in the harbor, where there is a constant traffic of vessels to and fro, and where a tug with sea-going length of line, and barge, or more than one, would stop all passing until the hawser was taken in, as it must be in any event to dock the tow.

This collision occurred between steam vessels; and whatever cause of complaint, if any, a sailing vessel might have on account of a hawser, it is respectfully submitted that none such can be had by the steamship Berkshire. She could take either side of the channel—go slow or fast, stop, and, if necessary, go back, and in case of danger was bound so to do.

They have not called a single witness outside of the ship to testify to any danger in this custom, except the gentlemen who are in charge two months in each year of the excursion boats running to the shore places, backward and forward, in Narragansett Bay. How well they are qualified to testify on such a question is most conclusively shown by their knowledge of the locality where this accident occurred. Some of them swear they know nothing about it; and a glance at the chart (Exhibit 1, M. W. S.,) in connection with their testimony must convince the court that the remainder without any doubt know but little.

The width of the navigable part of Narragansett Bay in this locality, and the bounds of it for vessels of this size, is wholly unknown to them, as it was unknown to the captain of the Berkshire—and hence this collision.

SIXTH.

As to whether, if the steamer had held her course at the last moment, without reversing her engine, she would not have cleared both tug and barge; and whether it was not bad seamanship on the part of the captain of the steamer to keep his engines reversed until the collision occurred.

The towboat has called as experts Captains Sutton—father and son,—Captain Bartlett, Captain Huntley and Captain Beckwith, and submitted to them hypothetical questions based on Captain Hooper's testimony. (For questions and answers see their testimony, pp. 285, 286, 287, 292, 293, 294, 295, 298, 299, 304, 305, 312, 313, 314).

They have unanimously testified that it was an error in judgment in Captain Hooper to reverse his engines in the position he was then in, and that such action on his part was bad seamanship and precipitated the collision he was endeavoring to avoid.

That the proper navigation of his ship and good seamanship on his part would have been to have stopped the headway of his ship and gone ahead slow under a starboard helm, so that in the event of a collision, if any occurred, the blow struck would be a glancing one, and the damage, if any, slight.

Not a single syllable of testimony has been introduced by the Berkshire to contradict this proposition.

SEVENTH.

The barge was proceeding directly behind the tug.

The testimony of every witness in position to know anything about the matter at all is, that the barge was steering directly behind the tug until the proximity of the Berkshire and immediate impending peril of collision caused the master of the tug to put his helm to starboard in order to save the tug.

Q. 30. How was the tow steering?
A. *Right after the tug.*
Q. 31. *Directly after?*
A. *Yes.*
Q. 38. *And the barge steered always directly behind her?*
A. *Yes, sir.* (Testimony George Hayward, pp. 156, 157.)

Q. 19. And whereabouts was the tug in the river?
A. The tug was right ahead of us.
Q. 21. And you were steering along directly behind her?
A. Yes, *directly behind her.*
Q. 30. And the tug was ahead of you? *How were you steering behind the tug?*
A. *Right straight on.* (Testimony John Neilson, p. 165.)

Q. 21. How did the barge steer after the tug?
A. *Steered the same as the tow boat.* (Testimony John Alies, p. 170.)

Q. 48. How was your barge steering with reference to the tug?

A. *Steering directly after her.* (Testimony of Captain Burnett, p. 176.)

Q. 45. How was the barge steering before the collision, with reference to the tug?

A. *Behind her.*

Q. 46. *Right along behind her?*

A. *Yes, sir.* (Testimony of H. L. Simpson, p. 193.)

Q. 89. You thought she would pass the barge just as she had passed you?

A. Yes, sir; and as she was going by *I looked and saw our barge straight behind us*, and as the Berkshire's bow went by our stern I saw her falling off a little, and then I was satisfied there would be a collision and stopped the boat. (Testimony of Captain Baker, p. 212.)

Q. 47. And how was the barge steering behind you?

A. She was following pretty well after us.

Q. 48. *Right along after you?*

A. *Yes.* (Testimony of John W. Farrel, p. 226.)

×Q. 48. Did you notice whether the tug was directly ahead of the barge, or whether they were swinging around the point?

A. *It was directly ahead;* the barge was just on the turn of the light. (Testimony of Thomas Smith, p. 257.)

The tug almost instantly turned on her heel and escaped the Berkshire, passing her within a very few feet; then, and not till then, were the tug and barge thrown out of alignment.

Q. 32. Was there any difference between the direction of the tug and the course of the tow?

A. Not at that time.

Q. 33. Was there at the time of the collision?

A. *Just before the collision, when the tug saw it was not going to clear the steamer, she kept off to the westward.* (Testimony of George Hayward, pp. 156, 157.)

Q. 55. Did you see the tug at any time change her course?
A. Yes, sir; I did.
Q. 56. How long was that before the Berkshire came up to her?
A. *She changed her course to avoid being run over.* She was heading up, and she headed a little to the westward. (Testimony of Capt. Burnett, p. 176.)

Q. 66. On which side?
A. On our starboard side. I waited then as long as I dared to, to see if she would take the side I blowed her to take, and found that we were going to come together, and righted our wheel and headed directly ahead of the barge.
Q. 67. That was the only change of course that you made?
A. Yes, sir.
Q. 68. That was when a collision seemed to be imminent?
A. It would have been if I hadn't done it. I done that to save the boat. (Testimony of Capt. Baker, p. 211.)

Q. 57. How close was she to you before you changed your course?
A. Very nearly abreast of us. Before I changed our course—before she came up to us—the captain told me to keep her off. He saw that a collision was imminent between the two boats, and he told me to keep her off; and I straightened her up about north as near as I can judge.
Q. 58. And then she passed to the starboard of you?
A. Yes, sir.
Q. 59. How close to you?
A. Thirty-five or forty feet.
Q. 60. Just cleared you?
A. Yes. (Testimony of John W. Farrel, pp. 226, 227).

Q. 28. Did you notice the Berkshire as she passed the tug?
A. *Yes; the tug was coming up the channel here, and I took it that when the towboat saw that the collision was likely to occur she seemed to swerve off to the westward of the channel,* and the Berkshire came down, and she seemed to swerve as they got close together over to the westward, and she struck the barge on the starboard side right close to the bow. (Testimony of Charles Penno, p. 264).

The helm of the barge was also immediately put hard-a-starboard when it was apparent there was danger of collision.

Q. 32. What was the order he gave?

A. *Put the wheel hard-a-starboard.*

Q. 33. Who was at the wheel?

A. John Elies. He gave me the order to go in and help him.

Q. 34. Where were you in reference to the pilot house?

A. Fore part of the house.

Q. 35. How far from there to the pilot house?

A. Three or four steps.

Q. 36. You stepped into the pilot house?

A. Yes, sir.

Q. 37. When you got there how did you find the wheel?

A. I found it a little over to starboard, but not hard over. I helped him put it hard over. When we got it hard over the Berkshire struck her. (Testimony of John Neilson, pp. 165, 166.)

Q. 24. What order did he give you?

A. Told me to put the wheel hard-a-starboard.

Q. 26. Did you put the wheel hard-a-starboard when you got the order?

A. Yes, sir.

Q. 27. Did anybody go into the pilot house to help you?

A. Yes, sir.

Q. 28. Who was it?

A. The cook.

Q. 29. Do you know his name?

A. John Neilson. (Testimony of John Elies, p. 170.)

Q. 59. When you saw the tug head to the west what did you do?

A. I told the man to starboard the wheel, hard-a-starboard.

Q. 60. Did you send him any assistance?

A. I did.

Q. 61. Who did you send?

A. Sent him John Elies, who was standing close by. (Testimony of Captain Burnett, p. 177.)

Q. 54. Did you hear any order given on the barge about changing the wheel?

A. After the Berkshire had passed the tug, and before she struck her, I did.

Q. 55. What order was that?

A. The captain gave the order to the man at the wheel to put the wheel hard-a-starboard, and sent another man in there to help him do it. (Testimony of H. L. Simpson, p. 194.)

Q. 43. Did she change her course at all?

A. Not as I could see until she was going to strike us. Then her head swung round a little.

Q. 45. How far off?

A. Perhaps not more than 150 feet.

Q. 48. How did she go into you?

A. She struck on the starboard bow, and she came right in, pretty nigh head on, and fetched up on the port side, about 40 feet abaft the stern.

× Q. 133. You think when you saw the course of the Berkshire change she was not more than 150 feet off?

A. No, sir; she was not over that. (Testimony of George Hayward, pp. 157–162.)

Q. 30. Did you see the Berkshire turn to the westward, and toward the barge, shortly before the collision?

A. He turned right towards the barge.

Q. 31. How far off was it when it turned towards the barge?

A. It was thirteen or fourteen fathoms when the Berkshire turned towards us. (Testimony of John Elies, p. 170.)

Q. 62. After the Berkshire passed the tug did you notice any change in her course?

A. *When she was about 100 feet from us her head fell to the westward.* That was, I suppose, on account of reversing her engines. (Testimony of Charles F. Burnett, p. 177.)

Q. 58. When did you see her bow pay off?

A. After she had passed the tugboat, it was probably a length of the barge from the barge when she commenced to. It was after she got by the tugboat.

Q. 59. You think her bow commenced to pay off after she had passed the tugboat, and after she was about a length from the barge?

A. I should think so. (Testimony of H. L. Simpson, p. 194.)

Q. 34. How far off was she from the barge when her bow seemed to swerve?

A. About 200 or 300 feet.

Q. 35. Just about when she passed the tug?

A. I should think that just about then. (Testimony of Charles H. Penno, p. 265.)

The testimony of the Berkshire's witnesses that having cleared the tug they would have cleared the barge, also, had she been directly behind, is wholly without foundation.

The TUG escaped being struck only by her rapidity in getting out of the way. The Berkshire, being reversed, was continually changing her course, turning her head to starboard and westward towards the barge, by the way she was managed, and thus brought about the collision with the barge which would have occurred between her and the tug but for the seamanlike way in which the tug was managed and escaped. It was through no skill on the Berkshire's part that she got by the tug without a collision. From the position in which Hooper's ignorance had placed his ship and his management of her, not a single thing was done by her to avoid a collision with either tug or barge.

Hooper says his ship would not mind her hard-a-starboard helm; that she smelled the bank; and that she backs aport, throwing her head around to starboard. See his testimony.

All these causes contributed to throw her head into the barge struggling to get out of her way.

See testimony of H. L. Simpson, George Hayward, Charles F. Burnett, Charles Penno and Peter McLaughlin above quoted.

EIGHTH.

The Berkshire was running at a dangerous and unsafe rate of speed.

The actual distance traversed by the Berkshire by measurement on the chart, Exhibit Z, from the head of the N. Y. wharf to the red buoy above Sabin's Point, is about 3⅞ knots or 4½ miles.

The time she was making this distance is shown on her log. (Exhibit A. F. H.)

This shows that at

2:40 P.M.	Ship left Providence for Norfolk.
2:52	Her engines started at full speed.
3:02	Ship was slowed, stopped, and backed full speed. She came into collision with N. & W. Coal Barge No. 4. Barge sunk.
3:05	Engines stopped.

Thus from the time the engines started at Providence until the Berkshire's bow was rammed into the barge, the engines had been running only 25 minutes in all—of this ten minutes only at full speed and 3 minutes backing—part of the time with her bow into the barge after the collision.

The engineer testified that her full speed is 12 knots.

The distance from Providence, 3.875 knots.

From this we find, supposing her to run at half speed for the first thirteen minutes, she would have made 1.3 knots, and that she must have made the remaining distance, 2.575 knots, in practically ten minutes.

10 : 60 : : 2.575 : x or at the rate of 13.45 knots, more than fifteen miles an hour.

Which is practically full speed, plus the tide, which favored her.

The blow inflicted shows that she must have been coming at a tremendous rate. (See photograph exhibit.)

LAW POINTS.

This case is governed by the rules laid down in the Revised Statutes and by the Inspectors of Steam Vessels.

General Rules and Regulations of the Board of Supervising Inspectors of Steam Vessels, Jan. 1894, page 67, Rules I, II, VI, and page 72.
The Garden City, 26 F. R. 772–774.
The Victory, 68 F. R. 397, May 28, 1895.
The Britannia, 153 U. S. 130.
The John King, 49 F. R. 470.

I.

The Berkshire in its testimony, and also in the argument of the case in both the lower Courts contended that it was a case under Rule 19, the "crossing" rule.

This is not a case of crossing within the meaning of that rule.

When sighted these vessels were on opposite sides of the channel for deep draught vessels in the upper part of Narragansett Bay. This channel at the red buoy just north of Sabin's Point Lighthouse, in the pleadings and proofs mentioned, makes a sharp turn to the northeast, while south of that point the channel is nearly north and south.

The Berkshire was coming down on the westerly side of this northeast stretch; the tug and tow were coming up on the easterly side of the stretch of channel running north to the red buoy above mentioned. There was no intention of crossing by the tug; she was following the easterly side of the channel, and had been for some time before the collision. The Berkshire in another stretch of the channel was following the westerly side and had been, and had passed the steamer Bay Queen one-half to three-eighths of a mile above in that manner. Instead of keeping on that side, however, as she approached the red buoy which marked the turn of the channel, she gradually came across the channel from the westerly side until she was on its extreme easterly edge, and passed within a few feet of the red buoy, thus leaving the entire channel nearly 1500 feet wide to the westward.

An examination of the Chart (Exhibit 1, M. W. S.) will show that it was impossible for the Berkshire coming out of Narragansett Bay north of Sabin's Point Light, in any part of the navigable water for a vessel of her draught, to have been other than on the starboard side of a vessel coming up the Bay south of Sabin's Point Light,—the whole channel north of the red buoy above the Light being to the starboard of the vessel coming up.

Both vessels were well known to each other and had been running in and out of Providence on regular trips for years. There was no other place, wharf, dock or anchorage for the tug to be bound to than Providence. The steamer knew the tug was bound up the river to Providence.

And it is submitted that this "crossing" rule above has no application in this case, the two steamers not being in the same stretch of the channel; but that the case is governed by and falls clearly within Rule 18, the end on rule, because as both vessels were following the turns in the channel they must of necessity be meeting end on when they met in the same stretch of channel.

See Hasbrouck 93 U. S. 405.
Galatea 92 U. S. 439.
Velocity L. R. 3, P. C. 44.
Ranger & Cologne L. R. 4, P. C. 519.
Marsden Collisions at Sea, 344 (3d ed.)

The testimony conclusively shows that everything that could be done by the tug to keep out of the way of the Berkshire was done; at the proper distance, and when everything was clear between the vessels, notice of the intention of the tug to pass port to port was given by the tug; she was then on the easterly side of the channel, and continued to hug that side until the moment before the collision, and for some time before the collision she had been running under half speed against an ebb tide, making not over two or three knots over the land. There was nothing more she could have done.

While under this rule the tug was obliged to take these precautions to avoid a collision, the Berkshire was under a correllative duty. When she first sighted the tug she was on the west side of the channel following it down.

She was bound to maintain her relative position in the channel, or if she proposed to change it, to give notice by a timely signal to that effect; she was bound to answer the signal of the tug and she was bound to go slow and be under such command that she could, if necessary, stop and reverse in time to avoid a collision.

She violated and neglected every obligation she was under, and every precaution she was bound to take.

She crossed the channel and gave no notice of such intention.

She did not answer the signal of the tug.

She gave no signal herself.

She continued to run at full speed with the tide until she was within three or four hundred feet of the tug, and until she was so close to the easterly bank of the channel that she was unmanageable.

The explanation of this manœuver on the part of the Berkshire is made by Captain Hooper himself.

He thought in the first place that the channel was only 250 to 300 feet wide, and that the tug and tow would have to go north so far to round the point at the red buoy that he would be able to run out under the stem of the barge, and with that intention, and that idea of the width of the channel, and without giving any signal he gradually crossed to the easterly side and continued at full speed until within three or four hundred feet of the barge. When he got to that point he found that neither the tug nor barge were far enough north to begin to turn, and that both were on the easterly tide of the channel—as far easterly as they ought to be. Then he discovered that he had made a mistake, which he attempted to remedy by reversing his engines, but only made the matter worse by keeping them reversed until a collision was inevitable.

The tug and tow being on the easterly side of the channel all the time were bound to remain on that side, and the Berkshire on the westerly side of the channel was bound to maintain her relative position in the channel, but she improperly and contrary to all rules, without giving any signal of her intention, crossed over to the other side.

In the Concho, 58 F. R. 813, the Court say: "There was abundant unobstructed room for the Concho to the right, and had the tow been observed, and had the Concho ported in time, so as to pass to the starboard by a reasonable margin, as she could easily have done, the collision would have been avoided. It could have easily have been avoided by reversing sooner, which was equally in her power."

The Crossman, 58 F. R. p. 811.

To the same effect see the Greenville, 58 F. R. 806, where the Court say: "I think the responsibility for this collision should be placed wholly upon the Greenville, because without reason or necessity in approaching the draw of the Third avenue bridge she shaped her course for the easterly passage, which was on the port hand, instead of taking the starboard or westerly passage. This was in violation of the ordinary rule of navigation; and it materially and unreasonably obstructed and endangered the passage of the Devoe and her tow through the easterly side of the draw."

Mere inconvenience will not excuse her departure from the rules; such departure must be "necessary to avoid immediate danger."

The Kate Irving, 2 F. R. 924.
The Mary Shaw, 6 F. R. 920.
The Packer, 58 F. R. 251.
The Lowell M. Palmer, 58 F. R. 701.
The Portia, 64 F. R. 811.
The Pequot, 30 F. R. 841.

II.

In rounding a bend neither of two approaching vessels has a right to assume that the other will hold her exact course by compass, but only her relative situation in the stream.

In the William H. Beaman, 18 F. R. 335, on this point the court say: "The course of the Thompson when first seen may have been towards Comminipaw, and to the starboard of the Beeman. But, as the Thompson was then upon the bend, the Beaman had no right to assume that the Thompson was going to Comminipaw or would hold the exact course she was on. The ordinary traffic around the Battery forbids any assumption. All that she had a right to assume was that the Thompson would not change her relative position in the stream in going around the bend without a clear and timely signal."

See also the Scots Grays, 19 F. R. 216.

The Josephine B., 58 F. R. 813, is a case almost identical with the one at bar. There the Court says:

"These were steamboats meeting each other on waters within the jurisdiction of the State of New York, and the rule of the road required each boat so meeting to go towards that side of the river which is to the starboard or right side of such boat.

"This the Josephine B. did not do. Her master admits that when he first sighted the Arrow she was 1200 feet off. At that time he was in no immediate danger. He admits that he knew the rule of the road, and took the responsibility for departing from it, and of directing his course toward the port side of the river. He further admits that he might have gone between the Arrow and the Ward's Island shore, if he had made up his mind to do so when he first sighted her. The rocks known as "Hogs Back" interfered with navigation close to the Ward's Island shore, but he saw the Arrow before he got near the Hogs Back, and might, for all that appears, have kept on that side of the channel, stopping his engines, or running them sufficiently slow to hold his tug against the current till the Arrow and her tow had passed him on the side which the law required them to take. Indeed the master of the Josephine B. admits that he could have stopped. His excuse for this manœuvre is THAT HE SUPPOSED THE ARROW, HAVING A TOW ON SUCH A HAWSER, WOULD GO WELL OVER TOWARDS HOGS BACK TO PREVENT THE STRONG TIDE WHICH SWEEPS ACROSS THE CHANNEL FROM THAT POINT FROM CARRYING SUCH A TOW UPON STEEP OR SCALY ROCKS ON THE ISLAND SIDE. BUT HE HAD NO RIGHT TO ASSUME THAT THE ARROW WOULD THUS DISOBEY A STATUTE in the absence of some controlling custom of navigation at that point, or some notification by her in that she was intending to depart from the rule of the road.

"We agree with the district judge that there is no such preponderance of evidence in the case as will establish a custom changing the general rule, and no notification to that effect was given by the Arrow; in fact, the only signal given by the latter was a single blast, indicating a manœuvre in conformity with the rule. The Josephine B. was therefore clearly in fault for not obeying the rule of the road and passing port to port."

The Bridgeport, 35 F. R. 222.

III.

It was negligence on the part of the steamer not to have noticed the whistle of the tug.

The Franconia, 3 F. R. 397.
The Garden City, 19 F. R. 529.
The B. B. Saunders, 19 F. R. 119.
The Grand Republic, 16 F. R. 424–427.
The Clifton, 14 F. R. 586.
The Wm. H. Beaman, 18 F. R. 334.
The Hudson, 14 F. R. 489.

IV.

There was no negligence on the part of the tug in taking a single barge, drawing 19 feet 6 inches, up Narragansett Bay on a hawser 50 fathoms long, there being no regulations to the contrary.

In the Josephine B., *supra*, the Court say on this point :

"Such a method of navigation seems unwise. But not only is there evidence that it is quite common, when a tug has a single large schooner in tow, but some of the experts testify that such is the safer course, and that the other method would render control of the tug more precarious, while not increasing materially her control of the tow. We concur with the district judge in the conclusion that the conflict between the experts is so great that in the absence of any special regulations on the subject, the party holding the affirmative of the question has not shown towing on a hawser to be a fault by a fair preponderance of proof."

V.

Under both the Revised Statutes and the local rules as laid down by the inspectors of steam vessels, it was negligence on the part of the Berkshire not to have slackened her speed, or stopped and reversed if necessary.

Inspectors' Rules, Rule III, pp. 67, 68.
The Charlotte, 51 F. R. 461.

It is evident that, although she saw she was approaching a tug encumbered by a heavy tow in a bend of the channel, she did not slacken her high rate of speed until in the very jaws of danger.

In the Alleghany, 9 Wall, 522, the Court say: "The propeller entered the cut at too great speed. This increased the danger. It brought her to the place of greatest difficulty at the most unfavorable time for passing it, besides making her unmanageable."

The City of New York, 15 F. R., 627, 628.
The Kate Irving, 2 F. R., 924.

FINALLY.

Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is of itself sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor.

The City of New York, 147 U. S. 85.
Ludvig Holberg, 157 U. S. 71.

The District Judge and the Circuit Court of Appeals both found the Berkshire alone responsible for this collision, and it is respectfully submitted that their decisions were and are correct, and ought to be sustained.

W. G. ROELKER,

Proctor for the Appellees in the United States Court of Appeals for the First Circuit.

164-707

164-707

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1896.

660

EX-PARTE

The Louisville Trust Company, Trustee, - - - Petitioner.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF IN SUPPORT OF THE APPLICATION.

ALEXANDER POPE HUMPHREY,
Of Counsel.

E. A. FERGUSON,
ST. JOHN BOYLE,
GEORGE M. DAVIE,
Counsel.

JOHN P. MORTON & COMPANY, LOUISVILLE, KY.

United States Circuit Court of Appeals

FOR THE SIXTH CIRCUIT.

OCTOBER TERM, 1896.

LOUISVILLE TRUST COMPANY, - - - *Appellant*,

VERSUS

THE CITY OF CINCINNATI, - - - - *Appellee*.

You are hereby notified that on Monday, the thirtieth day of November, 1896, the appellant, the Louisville Trust Company, will present a petition to the Supreme Court of the United States, in the city of Washington, District of Columbia, and will move the court for a writ of *certiorari* or other process, to be addressed to the Circuit Court of Appeals for the Sixth Circuit, to certify to the said Supreme Court for its review and determination the record in this case, and for such other and further process as may be needful and proper.

E. A. FERGUSON,
A. P. HUMPHREY,
ST. JOHN BOYLE, *Counsel*.

Service of this notice is accepted November 13, 1896.

FREDERICK HERTENSTEIN,
By FRANK F. DINSMORE, *Corporation Counsel*.

Service of this notice is accepted November 13, 1896.

MILLER OUTCALT,
Counsel for W. A. Goodman, Trustee.

Service of this notice is acknowledged November 13, 1896.

J. D. BRANNAN,
Of Counsel for City of Cincinnati.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1896.

Ex Parte—THE LOUISVILLE TRUST COMPANY, TRUSTEE.

MOTION.

Now comes the Louisville Trust Company, of Louisville, Kentucky, Trustee, by E. A. Ferguson, St. John Boyle, Alex. P. Humphrey, and Geo. M. Davie, as counsel, and moves this honorable Court that it shall by *certiorari* or other proper process directed to the honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, require said court to certify to this court, for its review and determination, a certain cause in said Court of Appeals lately pending, wherein the Louisville Trust Company, Trustee, was appellant, and the City of Cincinnati and others were appellees, and to that end now tenders herewith its petition, together with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

E. A. FERGUSON,
ST. JOHN BOYLE,
ALEX. P. HUMPHREY,
GEO. M. DAVIE,
Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1896.

Ex Parte — LOUISVILLE TRUST COMPANY, LOUISVILLE, KENTUCKY, TRUSTEE.

PETITION.

PETITION FOR WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES, FOR ITS REVISION AND DETERMINATION, THE APPEAL TAKEN BY THE LOUISVILLE TRUST COMPANY, TRUSTEE, AGAINST THE CITY OF CINCINNATI AND OTHERS.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

This petition of the Louisville Trust Company, Trustee, respectfully represents as follows:

First: Your petitioner is a corporation of the State of Kentucky. The City of Cincinnati is a municipal corporation of the State of Ohio.

Second: A bill in equity was brought by your petitioner in the Circuit Court of the United States for the Southern District of Ohio, at Cincinnati, for an injunction against a disturbance of its property and franchises in said city. The case was heard before the Honorable George R. Sage as Circuit Judge, who rendered a decree dismissing the complainant's bill. (R. 349.) From this decree an appeal was taken to the United States Circuit Court of Appeals for the Sixth Circuit.

Third: The case having been heard before Taft and Lurton, Circuit Judges, and Hammond, District Judge, the opinion of the court was delivered on October 5, 1896, reversing in part the decree of the lower court. (R. 358.) A petition for a rehearing was duly filed (R. 394), and was denied without any opinion other than an oral one.

Fourth: The complainant, the Louisville Trust Company, is the trustee in a mortgage executed by the Cincinnati Inclined Plane Company, January 1, 1889. The latter company is an Ohio corporation, and at the time the bill was filed was operating an inclined plane and connecting railroads in the city of Cincinnati, beginning at a point on the Carthage pike about five miles north of the city of Cincinnati; thence south to the city limits at the Zoological Gardens; thence through the city by Auburn and Vine streets to the summit of the inclined plane at Locust Street; thence down the incline to its base at Mulberry Street; thence to the intersection of Main and ~~Mulberry~~ Liberty; thence south along Main to Court; thence west on Court to Walnut; south on Walnut to Fifth; thence east on Fifth to Main; thence north on Main to the foot of the incline.

The matter involved in the controversy was the right of the city of Cincinnati to prevent the operation of the line so far as it was situated within the city limits.

The Cincinnati Inclined Plane Company held its franchises under its organization pursuant to an act passed by the Legislature of Ohio in the year 1852, the company having been organized in the year 1871. (R. 62.) This statute gave to the company perpetual succession.

By section 12 of that act it is provided as follows:

> "SECTION 12. If it shall be necessary, in the location of any part of any railroad, to occupy any road, street, alley, or public way, or ground of any kind, or any part thereof, it shall be competent for the municipal or other corporation or public officers, or public authorities, owning or having in charge thereof, and the railroad company to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied; and if said parties shall be unable to agree thereon, and it shall be necessary in the judgment of the directors of such railroad company to use or occupy such road, street, alley, or other public way or ground, such company may appropriate so much of the same as may be necessary for the purposes of such road, in the same manner and upon the same terms as is provided for the appropriation of the property of individuals by the tenth section of this act; provided, that every railroad company laying down any such track or tracks upon any such public street, road, alley, or other public ground, shall be responsible for injuries done to private property by such location lying upon or near to such public ground, which may be recovered by civil action brought by the owner or owners at any time within two years from the completion of such track or tracks before the proper court."

The central feature of the enterprise was the erection and maintenance of an inclined plane, made necessary by the fact that the city of Cincinnati is shut in by a range of hills which rise abruptly from the level of the land adjacent to the river to a broad plateau between three and four hundred feet above. To a successful utilization of the inclined plane it was necessary to provide means by which the traveling public could reach the same at the base and summit. Accordingly, in December, 1871, the General Council of the City of Cincinnati, by ordinance regularly passed, gave the company permission to occupy the streets with a railroad leading from the base of the incline to Fifth and Market Square. The route was south along Main to Liberty; west on Liberty to Walnut; south on Walnut to Fifth; east on Fifth to Market Space. This permission to occupy these streets, given by the city of Cincinnati, was of unlimited duration; that is, it was not limited in point of time. It was, however, provided that animal power only should be used as a motive power. (R. 68.)

Likewise, in 1871, permission was given the company in erecting its inclined plane to cross overhead so as not to obstruct travel on Miami, Dorsey, and Baltimore streets, and to occupy a small portion of Locust Street. This permission was limited to twenty years. (R. 67.)

In 1875 the same authority—the General Council of the City of Cincinnati—gave to the same company permission to occupy the streets from the summit of the inclined plane to the Zoological Garden, then the northern boundary of the city. This permission was limited to thirty years. (R. 70.) It also included a restriction upon the motive power to animals, and provided that the Inclined Plane Company should contract to carry passengers through from the Zoological Garden to Fifth and Main streets.

Early in the history of the building of street railroads it became the habit of the city of Cincinnati to establish routes and to open them to competitive bidding. In the year 1864 there was constituted "Route No. 8." This began at Fifth and Main; went north on Main to the base of the hill, to surmount which the Cincinnati Inclined Plane Railway Company erected its incline, and along the summit of the hill on streets coincident with those contained in the ordinance to the Inclined Plane Company of 1875. This Route No. 8 was for a double track from Main and Liberty to Main and Court; thence with a single track west on Court to Walnut, with a single track south on Walnut to Fifth; east on Fifth to Main; north on Main to Court.

It so happened that the same persons who owned this "Route 8" came to own the Cincinnati Inclined Plane Company. They therefore, after completing the Inclined Plane, built a line of road from the summit of the incline, taking advantage of the grant to the company by the ordinance of 1875, and of Route 8, each of which gave a single track, and in this way the company had a double track.

In reference to the location of the line from the base of the incline, the company built a double track down to Main and Liberty, but instead of going west on Liberty to Walnut, as authorized by the ordinance of 1871, continued south on Main to Court, as authorized by the grant of Route 8, west on Court to Walnut, thence, as authorized both by Route 8 and the ordinance of 1871, south on Walnut to Fifth; thence, as authorized by both of these permissions, east on Fifth to Main; thence, as authorized by Route 8, north on Main to Court. There are attached hereto diagrams showing the position of the inclined plane, the railroads operated in connection South with it at the time of the filing of the bill, and the sources of permission as to each of these railroads. Their location is necessary to the understanding of the controversy, because the learned Circuit Court held that none of the franchises were in force, and the learned Circuit Court of Appeals held that some had expired and others had been abandoned, while still others it held to be in existence.

Route 8, when established, was limited to twenty years. (R. 145.)

On the 30th of March, 1877, the Legislature of Ohio passed the following law:

> "SECTION 1. Be it enacted by the General Assembly of the State of Ohio, that any inclined plane railway or railroad company heretofore or that may hereafter be organized under the Act of

May 1, A. D. 1852, entitled 'An Act to provide for the creation and regulation of incorporated companies in the State of Ohio,' shall have power *to hold, lease, or purchase and maintain and operate such portion of any street railroad leading to or connecting with the inclined plane as may be necessary for the convenient dispatch of its business, upon the same terms and conditions on which it holds, maintains, and operates its inclined plane:* Provided, that no other motive power than animals shall be used on the public highways occupied by such street railway company without the consent of the Board of Public Works in any city having such a board, and the common council or the public authority or company having charge or owning any other highway in which such street railroad may be laid; and provided, that no inclined plane railway or railroad company shall construct any track or tracks in any street or highway without first obtaining the written consent of a majority of the property-holders on the line of such proposed track or tracks, represented by the feet front of lots abutting on the street or highway along which such track or tracks are proposed to be constructed.

"SEC. 2. No such purchase or lease shall be made without the consent of the holders of the stock in the company purchasing or leasing, and in the company leasing or selling such street railroad, or the owners thereof.

"SEC. 3. This act shall take effect on its passage."

On June 21, 1877, the Cincinnati Inclined Plane Company took from the owners of Route 8 a perpetual lease. (R. 79.) This lease contained also an option of purchase, which was exercised September 21, 1889, when Route 8 was absolutely conveyed to the company. (R. 102.)

Between 1884 and 1890 the Inclined Plane Company, under permission of the Board of Public Works of the city of Cincinnati, changed the motive power along the whole line to electricity, and this involved a large expense, and also a reconstruction of the inclined plane. (R. 302, 305, 306.)

There was in this period no challenge by the city or any of its officers of the right upon the part of the Inclined Plane Company to exercise all their franchises.

The conduct of all parties clearly indicates that between the passage of the act of 1877 and December, 1890, that act was construed by everybody as clearly granting to the Inclined Plane Company the right to all of its franchises acquired and to be acquired as of unlimited duration. Thus the Inclined Plane Company at once took a lease of Route 8 for ninety-nine years, renewable forever, with the privilege of purchase. (R. 29.)

On January 1, 1879, the company executed and recorded a mortgage upon all of its railway franchises and property, including Route 8. (R. 18.) The lessors joined in this deed of trust so that it might be superior to their claim for rent. One hundred and twenty-five thousand dollars was raised by this mortgage and used for the purpose of paying the debts of the company and making improvements upon the property. September 24, 1885 (which was a year after Route 8 is said to have expired), the Board of Public Works of the city of Cincinnati passed a resolution consenting to the use of electricity, cable or compressed air as a motive power by the company. (R. 30.) In accordance with this resolution the company executed a bond to the city of Cincinnati in the penalty of $25,000. The Act of 1877 had pointed to the Board of Public Works as the proper body to determine motive power. August 12, 1887, pursuant to a joint resolution of the Board of Aldermen and Councilmen of the city of Cincinnati, Edwin Henderson, city clerk of Cincinnati, submitted a report to one board upon the street railroads of the city. (R. 173.) This report informed the board in regard to the condition of this particular line. In October, 1888, the company applied to the Board of Public Affairs (which in the mean time had taken the place of the Board of Public Works), for permission to erect along the entire length of the road the appliances necessary to operate and maintain the line as an electric road, changing and relaying tracks and improving the curves and switches. This matter was considered by the Board of Public Works with great deliberation. (R. 302-306.) The city solicitor was asked for his opinion upon the subject, which he gave. The resolution was passed, giving permission to erect the poles, change and relay the tracks, and fixing the conditions under which these permissions should be exercised. (R. 305.) The company proceeded to carry out the terms of this permission, and, in order to do so, issued $375,000 of bonds and $150,000 of preferred stock. In the mean time, when the company began to operate its line from the Zoological Garden to Fifth and Main, the Telephone Company sued it to enjoin the use of electricity unless there should be constructed a return circuit. It was claimed by the Telephone Company that the Inclined Plane Company had no lawful franchise at all. Judge Taft (23 W. L. B. 165), in an opinion delivered about March 10, 1890, decided that the Telegraph Company had the right to question the franchise of the Inclined Plane Company, but he decided that the Inclined Plane Company was in the lawful exercise of its franchise. He, however, enjoined the Inclined Plane Company from using the single trolley system as disturbing the older franchise of the Telephone Company. This opinion, in its latter feature, was reversed by the Supreme Court of Ohio, June 2, 1891. (48 Ohio St., page 390.)

Besides all this, during these years, 1884 to 1890, various streets had been reconstructed or repaired, and the company had taken up its tracks and relaid them, under the superintendence of the City Engineer, at large expense to the company, and in the most public way, a procedure altogether idle and extravagant upon the part of the company if its franchise had ceased in 1884.

Thus, from the time of the passage of the act in ~~1887~~ 1877 down to December 10, 1890, there was no challenge by the city, or any of the officers of the city, of the continued existence of Route 8, or, of what seems to have been believed by everybody, the manifest construction of the act of ~~1887.~~ 1877

On December 10, 1890, thirteen years after the passage of the act of 1877, and more than six years after the presumed expiration of Route 8, the city brought a suit against the Inclined Plane Company, questioning its right to operate Route 8, but failed to make the mortgagee a party. During this period the company had raised, upon the pledge of these franchises, more than $500,000, a large part of which must be considered to be absolutely wasted if the opinion of the Circuit Court of Appeals is sustained.

The result of this suit was a decree enjoining the company from the further exercise of the privileges embraced in this Route 8. This decree was confirmed by the Supreme Court of Ohio. (R. 193, 207, 310.)

On January 1, 1889, while the company was in the peaceful and, as was supposed, lawful exercise of all of its franchises, it executed a deed of trust to the Louisville Trust Company to secure $500,000 worth of bonds. Of this, $125,000 were retained against a prior mortgage, and $375,000 were issued and have gone into the hands of *bona fide* holders for value.

Seeing that the mortgaged property was about to be destroyed, the Louisville Trust Company, as trustee, filed this bill in the Circuit Court of the United States for the Southern District of Ohio, at Cincinnati, and insisted that as it had not been a party to the litigation between the city of Cincinnati and the company it was not bound by the decree, and that the franchises thus imperiled had been lawfully transferred to it and were being held by it for the benefit of its *cestuis que trust*, and praying relief against the city of Cincinnati, which it was alleged was about to tear up all of the tracks, not only those involved in the former litigation, but those not therein involved.

After the submission of the cause, but before the court had decided it, the complainant filed another bill in the same jurisdiction against the Cincinnati Inclined Plane Railway Company alleging default in the bonds, and as a result a receiver was appointed by the same court and is now in possession of the whole property. (R. 337, 348.)

Fifth: The learned Circuit Court held against the complainant on all points and dismissed its bill, thereby deciding not only that the franchises involved in the former suit between the company and the city could no longer be exercised, but that the other franchises not therein involved were likewise invalid and could not be exercised. (R. 349.)

Sixth: This decree having been appealed from, it was insisted by petitioner in the Circuit Court of Appeals, as it had been insisted in the court of first instance, that by the express provisions of the act of March 30, 1877, it had the right to hold, maintain, and operate such street railroads, leading to or connecting with the inclined plane, as might be necessary for the convenient dispatch of its business, upon the same terms and conditions upon which it held, maintained, and operated its inclined plane, namely, without limit of time.

The learned Court of Appeals differed from the lower court and held that the company was entitled to occupy the streets as provided in the ordinance of 1875 (R. 70) and under the ordinance of December, 1871. It, however, held that the right to occupy the streets embraced in Route 8 had expired in 1884, and that the right to occupy any of the streets conferred by the ordinance of December, 1871, which had not been actually built upon, had been abandoned, even though a large portion of these streets were embraced in Route 8.

The result of this decree would be to stop the operation of the road at Main and Liberty, one mile from the center of the city, thus rendering the franchises on top of the hill of little value, and almost totally destroying the value of the inclined plane.

Your petitioner respectfully represents:

First: The decision of the Circuit Court of Appeals involves the existence of the franchises of the Cincinnati Inclined Plane Company which have been transferred to your petitioner as security for mortgage bonds that have been issued and are negotiable in form, to the amount of $375,000, and have passed into the hands of *bona fide* purchasers for value. These bondholders will suffer a loss which it is not possible to exactly compute, but which will be very large.

Second: The mortgage was made and the bonds sold without any warning upon the part of the authorities of the city of Cincinnati that the franchises were in any respect defective or subject to challenge. The money arising from the sale of the bonds was used to equip the line with electricity and to otherwise improve it under the permission of the authorities of Cincinnati, when, if its present contention is true, the franchises no longer existed, but had expired five years previous thereto.

Third: The Circuit Court of Appeals sustains the contention of the petitioner that the judgment rendered against the Inclined Plane Company at the suit of the city is not binding upon the petitioner because it was not a party to that record. It further sustains the contention of the petitioner that the Inclined Plane Company was properly organized under the act of 1852, or if not so properly organized under that act, its organization was ratified by the passage of the act of 1877; that under the act of 1852 it had perpetual succession and had the right to occupy such streets of the city of Cincinnati as might be assented to by the municipal authorities, or in lieu of such assent, as it might condemn; that the building and operation of the inclined plane was the central feature of the enterprise, and the building and operation of railroads leading to the summit and base was incidental thereto, although necessary for the successful conduct of the scheme of improvement; that the city did assent to the building and maintenance of the line from the summit of the incline north to the city limits by the ordinance of 1875; that the city likewise assented to the building and operation of the line from the base of the incline to the center of the city under the ordinance of 1871.

The court holds both of these permissions were accepted by the corporation and lines built under the permission thus granted. It appears that only a part of the line for which permission was given under the ordinance of 1871 has been constructed, because another line could be used which would accomplish the same purpose; that this other line, namely, Route 8, was acquired after the passage of the act of 1877, by a perpetual lease, and then by purchase in 1887, without any challenge being made by anybody that it was still in existence, although, if the opinion of the court is correct, it had expired in 1884. The court holds that by using this Route 8, which, according to the construction the court has now given on the subject, expired in 1884, the company intended to and did abandon the right to use a large part of exactly the same streets under the permission granted to it by the ordinance of 1871, which last ordinance is in perpetuity; that although the act of 1877 expressly authorized the company "to hold, lease or purchase and maintain and operate such portion of any street railroad leading to or connected with the inclined plane as may be necessary for the convenient dispatch of its business, upon the same terms and conditions on which it holds, maintains, and operates its inclined plane," any such street railroad or portion thereof that may be purchased is to continue subject to the terms and conditions under which it was originally established, even though these may be entirely different from those under which the company holds, maintains, and operates its inclined plane; that although by the express terms of the act of 1877 the right is given to purchase *part of a route* theretofore established, yet when purchased it is to be held upon the terms and conditions under which the *whole route* was originally established. The court holds there is no estoppel upon the city, although its conduct has been such, since the alleged expiration of the franchise, as to induce the petitioner to take a deed of trust upon these very franchises, and the purchasers of these negotiable bonds to acquire them, upon the faith that they were secured by this deed of trust, and although the money raised by their sale has been used to improve this very property under the permission and superintendence of the city authorities; and yet the court holds that the city can claim that all unused privileges of the ordinance of

1871 have been abandoned, although it clearly appears that such non-user was caused by the belief of the company that it was entitled to use Route 8.

Fourth: The opinion of the Circuit Court of Appeals, it is believed, is without authority in its most important findings, and is opposed to the weight of reason and precedent upon matters which are vital to the controversy, and deals with a subject, the right of railroads to occupy streets in a city under legislative authority and municipal consent, which is of vast importance and is the subject at the present time of litigation in many of the circuits of the United States, and that therefore this case should, in the interest of uniformity of decision, be taken under consideration by this court so that a rule may be established, which will be of general application through all the circuits of the United States.

Fifth: The court holds that the city is not estopped from claiming that Route 8 expired in 1884, although after that date its Board of Public Works authorized the equipment of the lines with electricity, and at the same time holds that the city can claim an abandonment of the privilege granted by the ordinance of 1871 for non-user, when such non-user was the result of the company's belief that it could use Route 8.

Wherefore your petitioner prays that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record in all proceedings of the said Circuit Court of Appeals in the case therein entitled Louisville Trust Company, Trustee, v. City of Cincinnati, etc., to the end that the said case may be reviewed and determined by this court, as provided by law, and that the judgment of the said Circuit Court of Appeals in the said case may be modified so as to reverse the judgment of the Circuit Court and grant the prayer of the petitioner in its original bill; and so your petitioner will ever pray.

E. A. FERGUSON,
ST. JOHN BOYLE,
ALEX. P. HUMPHREY,
GEO. M. DAVIE,
Counsel for Petitioner.

STATE OF KENTUCKY, } SCT.
JEFFERSON COUNTY. }

Alexander P. Humphrey, being duly sworn, states that he is one of the counsel for the Louisville Trust Company, Trustee, the petitioner named, that he has read the foregoing petition, and the facts therein stated are true as he believes. ALEX. P. HUMPHREY.

Subscribed and sworn to before me this 17th day of November, 1896. R. A. BATMAN,

N. P. J. Co., Ky

My commission expires January 25, 1900.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

EX-PARTE

Louisville Trust Company, *Trustee*, *Petitioner*.

BRIEF IN SUPPORT OF THE APPLICATION FOR A WRIT OF CERTIORARI.

We hope to bring this brief within as narrow a compass as is possible consistent with submitting to the court our grounds for believing that a *certiorari* should issue herein.

There are few subjects upon which there has been in late years and is now more litigation than the existence, extent, and validity of the franchises to operate a railroad in the streets of a municipality. Questions of this kind were pending in three circuits at the same time. The case of Citizens Street Railway Company v. City Railway, 64 Fed. Rep. 681, is now, we believe, pending upon appeal to the Circuit

Court of Appeals for the Seventh Circuit. The case of Baltimore Trust Company v. Mayor of Baltimore, 64 Fed. Rep. 160, from the Fifth Circuit is, we believe, pending on appeal before this court; and the case at bar and that of J. Simpson Africa v. City of Knoxville, 70 Fed. Rep. 729, were pending before the Circuit Court of Appeals for the Sixth Circuit at the same time. The Africa case has been reversed, but the opinion is not yet published.

Between the years 1860 and 1870 street railroads were built in many of the cities of this country. All of the municipalities at that time were very anxious to encourage these enterprises, which were of doubtful financial outcome. Grants by the legislatures and assents by municipalities were of frequent occurrence and sometimes of loose phraseology. Now that these enterprises have proved profitable attacks are being made upon them in a great many cities of the country. In practically every instance these attacks come, not from the State or from the municipality, but from the effort of rival companies to deprive the older organizations of what they have supposed themselves to be secure in, in order to appropriate the profit to the new company. The rules governing these franchises have been very differently announced by the different courts. The question involved in the Baltimore Trust Company v. Mayor of Baltimore, 64 Fed. Rep. 160, was decided one way by the Supreme Court of Maryland (Lake Roland Railroad v. Mayor, 77 Maryland, 352), and the exactly opposite way by the learned Circuit Court at the place cited; and in Citizens Street Railway v. City Railway, 64 Fed. Rep. 681, the opinion of Woods, Circuit Judge, is greatly different from that of Baker, District Judge, upon these subjects. So the opinion of the Circuit Court of Appeals in this case differs greatly from that of the Circuit Court.

That controversies of this kind involve large sums of money and are exceedingly important in their consequences to the litigants, the railroad companies as well as the municipalities and the rival companies, there can be no doubt. We submit that in the case at bar there is a departure from recognized precedents in some of its aspects, and an erroneous application of legal principles not governed by absolute precedents in others, such as to make this case not only of importance in itself but of importance as representing a series of similar controversies.

We submit the following reasons as showing the necessity and propriety of issuing a writ of *certiorari* in the case at bar:

THE FRANCHISES OF THE COMPANY ORIGINALLY GRANTED TO IT.

The learned Circuit Court of Appeals does not deny that it was competent for the Legislature of Ohio to make a direct grant to a corporation of the right to occupy the streets of its municipalities with street railroads; that the assent of the municipality was not necessary. (Sims v. Railway Company, 37 Ohio St. 750; City of Detroit v. Detroit R., 56 F. R. 880.) It further sustains the proposition that this particular company — the Cincinnati Inclined Plane Company—was formed under the provision of the General Statutes of Ohio, with a perpetual franchise, and that its central feature was the building of an inclined plane, an improvement in the then "state of the art of transportation" necessary for the growth of the city of Cincinnati. It further admits that this inclined plane, though the central feature of the enterprise and necessary to its successful conduct, yet would be shorn of most if not all its value if means were not provided for bringing the traveling public to and from its base and summit.

It holds that the ordinance of 1871 granting permission to occupy the streets from the base of the incline to Fifth and Market Space was within the competency of the municipal authorities of Cincinnati, and that its privileges were accepted by the Inclined Plane Company, and were of perpetual duration. Under it the company could undoubtedly have built a line of railroad from the base of the incline to Main and Liberty; thence west along Liberty to Walnut; south on Walnut to Fifth; east on Fifth to Main. It further holds that the ordinance of 1875 granting the right to build and operate a line of road from the same incline to the northern limits of the city was likewise properly passed and accepted by the company.

In regard to the limitation upon the ordinance of 1871 in reference to the incline plane itself, even though it may have expired by its terms (which we dispute), this would make little difference, as the company has acquired land on both sides of the street over which it crosses, and there is no claim as to there being any obstruction to travel upon the streets beneath the overhead structure.

In regard to the validity of these restrictions in the matter of time there is a wide difference of opinion between the courts of the Seventh and Sixth Circuits. The Sixth Circuit holds to the view as expressed in the opinion now before this court, that the permission of the municipality to a company to enter upon and occupy a public street with the necessary equipment of an electric street railway may be for a term longer or shorter than the corporate life of the company receiving it, the duration of the estate being dependent upon the terms of the grant and the power of the grantor to make. Detroit Citizens Street Railway v. Detroit, 22 U. S. A. 570–580.

To the contrary is the case of Citizens Street Railway v. City Railway, 64 Fed. Rep.

647, Woods, C. J., held that where the State had granted a franchise for one term of years the city could not, in giving its consent to the use of particular streets, limit that consent to a shorter term of years. If this is the law then the opinion of the learned Circuit Court of Appeals in the case at bar is radically erroneous. But even if it is not the law, it is submitted that by the act of 1877 (given in full in the petition for the *certiorari*) the State of Ohio meant to make the ownership of the methods of approach to the summit and base of the incline of a like unlimited duration to that of the inclined plane itself.

It is a striking fact that if the act of 1877 is construed to mean what we claim it to mean, it does nothing that was not at the time of its passage within the power of the General Council of the city of Cincinnati to do. At that time, viz., in 1877, there was no limitation upon the period for which the General Council of the city of Cincinnati might assent to the use of its streets for such purposes as are here involved. It could have passed an ordinance giving a license for twenty years, fifty years, or perpetually. There were absolutely no restrictions upon its power in that regard. That is to say, admitting that the city of Cincinnati had the right to assent to the occupancy of the streets by the Inclined Plane Company (and it clearly had that power under the act of May 1, 1852), it could have assented to such occupancy for the whole corporate life of a company organized under that law. There would have been no necessity, so far as the lines already established were concerned, for competitive bidding, nor for consent of the abutting property holders. Nor even would this bidding or new assent have been requisite if the city had agreed to a change of motive power from animal to cable or electricity. This is proved by many adjudged cases.

Haskins v. Cincinnati Railway, 4 W. L. B. 11.
Clement v. City of Cincinnati, 16 W. L. B. 355.
Pelton v. E. C. R. R., 22 W. L. B. 67.
Hadden v. E. C. R. R., 6 O. C. C. 318.

If the city could have done this, *a fortiori* the legislature could have done it.

The language of the act of 1877 is to the effect that a company organized under the act of 1852 should have power to hold, lease, or purchase and maintain and operate such portion of any street railroad leading to or connected with the inclined plane as may be necessary for the convenient dispatch of its business, upon the same terms and conditions on which it holds, maintains, and operates its inclined plane.

The legislature had choice of terms and conditions between those under which the roads held, leased or purchased by the inclined plane were originally established, and the terms and conditions under which the inclined plane was established under the act of 1852. It made choice of the latter, and emphasized its purpose by allowing the lease or purchase of part of a former line. It would seem to be almost a truism that the legislature could not have contemplated that the purchaser of a part of a route theretofore used should hold it upon the terms and conditions applicable to the whole route; in other words, allow a separation of a route into parts and yet mean to require those parts, under entirely different ownership and management, to continue to be operated as a whole.

The fact that the inclined plane was a central feature of the enterprise being recognized, it is obvious that there is every reason why the public should make easy the means afforded to passengers to reach the base and summit of the structure; and it is obvious that the termination of the right to occupy two blocks of a street might destroy the efficiency of the whole system. Hence the legislative purpose of assimilation of the terms and conditions of all franchises concurring in the enterprise.

It is to be noted in this connection that, as heretofore stated, by an ordinance of 1871 the company was given the right to cross, with its inclined plane, certain streets for twenty years. (R. 67.) The larger part of its plane was built on property the fee of which was acquired by the company. (R., map between 82 and 83.) It is a curious contention that this limitation upon the right of the company to cross these streets constitutes one of the terms and conditions upon which the company held, maintained, and operated its inclined plane. This is no more the case than if the company had leased from some private individual, for a limited term, part of the property upon which it built its inclined plane. In the case of a State, as well as in the case of an individual, from the time the license or lease expired neither the corporate existence nor the corporate franchises would come to an end, but the corporation would still have the power either to have the license or lease renewed for another definite term, or perpetually, or, under the express power granted in Section 12 of the act of May 1, 1852, to condemn the right in perpetuity.

This is rendered entirely unimportant by the facts in the particular case at bar. It does not seem to be disputed that the Cincinnati Inclined Plane Company occupies a part of Locust Street at the summit of its incline. But this was a mere paper street, ending abruptly in a bluff forty or fifty feet high. The company filled out beyond the edge of this precipice, and owning on both sides of the street occupied that part of it adjacent to this precipice.

So far as concerns the streets over which the plane is built, there is no claim that the travel is obstructed. The company owns the lands on both sides of the street. We submit that the same principle of law which retains in the owner of adjacent property title to the highway, except as much as is necessary for the public to secure a passage over it, the right to mines and minerals under its surface, equally retains to him the right to the air above the surface, provided that no structure be erected in such a way as to impede the natural use of the highway for travel. (R. 45, 46.)

Under the belief that it could acquire Route 8, and under the terms of the act of 1877 hold, maintain, and operate it, on the same terms and conditions upon which it held, maintained, and operated its inclined plane, the company, immediately after the passage of the act of 1877, took a perpetual lease upon Route 8, accompanied by an option to purchase; and in 1887 purchased it in fee. The purchase, it will thus be observed, was in fact made three years after the court holds that it had expired; and in the mean time the Board of Public Works, the authority pointed to in the act of 1877, had given to the company the right to change the motive power from animal to electricity.

We submit, therefore, that the learned Circuit Court of Appeals was clearly in error in holding that the Inclined Plane Company need obtain any further assent from the city in order to entitle it to hold, maintain, and operate Route 8 in accordance with the terms of its charter as granted under the act of 1852, which was not limited in time.

The learned Circuit Court of Appeals rejected the contention of the Superior Court of Cincinnati and of the learned Circuit Judge that it was not competent for the company to procure the assent of the city to the occupancy of streets with a railroad operated by animal or other power in order to bring passengers to and from the base and summit of the incline. It rejected the view of both of these tribunals that an effort was being made to extend a steam railroad by a street railroad, and held that the design of the enterprise which centered in the inclined plane could properly be carried out by the occupancy of the streets by such a structure as is involved in the ordinary notion of a street railroad. And yet it held with the Superior Court of Cincinnati that the act of 1877 was designed to impose upon the enterprise the same terms and conditions that originally attached to the establishment of street railroad routes, any part of which should be purchased by the Inclined Plane Company, instead of holding, as we submit was the correct view, that when any parts of such route originally established were purchased by this corporation the terms and conditions of the act of 1852 alone would be looked at.

THE QUESTION OF ABANDONMENT.

Another question involved in the opinion of the learned Circuit Court of Appeals, and which is for the first time in all this litigation announced here, is the rule which it lays down upon the subject of abandonment by the Inclined Plane Company of franchises lawfully granted to it, and which it lawfully held. If this company had never had any ownership of or interest in Route 8, it still would have been enabled to carry out the purposes of its creation and would be enabled to reach the termini which it has fixed in its articles of incorporation. The learned Court of Appeals held, as we have seen, that the ordinance of 1871 granted to the company the right to build and operate a line of double track railroad from the base of the incline to Fifth and Market Space, and by the ordinance of 1875 from the summit of the incline to the northern limits of the city. The latter grant the company has taken full advantage of. It has not taken full advantage of the other grant. It built its road, as we have stated, from the base of the incline to Main and Liberty. Instead of there turning west on Liberty to Walnut and going south on Walnut to Fifth, it followed the line of Route 8, continuing south on Main to Court, then going west on Court to Walnut, and south on Walnut to Fifth. The learned Court of Appeals has held that the failure of the Inclined Plane Company to build its track along Liberty from Main to Walnut, and along Walnut from Liberty to Court, has resulted in an abandonment of the whole privileges granted to it under the ordinance of 1871, except for the maintenance of its road from the base of the incline to Liberty Street. This is because, holding title to Route 8, it operated under that license rather than under the license granted directly to it by the ordinance of 1871; and the court holds that the abandonment is to be construed as applying even as to those streets where Route 8 and the ordinance of 1871 are coincident.

This question of abandonment of the privileges conferred upon the company by the ordinance of 1871 was not raised by any pleading in this case, nor was it touched upon in the opinion of the learned Circuit Judge. This was because the contention of the city (and with this the learned Circuit Judge agreed) embraced the proposition that the ordinance of 1871 was never valid at all. But the learned Circuit Court of Appeals, in remanding the case for further proceedings, examined the question of abandonment and held that the non-user of the privileges granted under the ordinance of 1871 had been such as in itself to amount to an abandonment of them. It was upon this point alone that the petition for rehearing was filed.

Special attention is respectfully called to the following cases cited in the petition for rehearing, and to the extracts from these cases given in the petition:

Raritan Water Power Company v. Veghte, 21 N. J. E. 463-480.

Utt v. Frey, 39 Pac. Rep. 807; 106 Cal. 392.

Boston Company v. Langdon, 24 Pick. 49; 35 A. D. 294.

Canal Company v. R. R. Company, 4 Gill & Johnson, 107.

Hestonville v. City of Philadelphia, 89 Pa. St. 210.

Roanoke Investment Co. v. Kansas City Co., 108 Mo. 50.

Dill v. School Board, 47 N. J. Eq. 421.

We do not propose here to enlarge upon these cases except to say that when the learned court came to overrule the petition for rehearing it did so without any other than an oral opinion. In the course of that oral opinion, however, the learned judge said that at last the question was one not concluded by positive precedent, but upon which there were but two authorities which might be said to be exactly in point. These were Henderson v. Central Passenger Railway, 21 Fed. Rep. 358, and West Jersey Trust Company v. Camden Horse Railway, 52 N. J. Eq. 452. The court adverted to the fact that this last case was an opinion by a

Vice-Chancellor of New Jersey, and that the judgment had been subsequently reversed, although not upon this ground.

There are few questions that can be stated of more importance than the one here involved, and in the case of West Jersey Traction Company v. Camden Horse Railway, 52 N. J. 452, above referred to, the learned Vice-Chancellor said in regard to such a claim of abandonment as this:

> "It was further argued, but quite faintly, that this route had been abandoned by non-user for twenty years. No anthority was cited in favor of this proposition, and I know of none. No limit was placed by the act upon the time within which the right should be exercised."

It is curious that what is quite faintly argued in 1894 should become established law in 1896.

But the case of Henderson v. Central Passenger Railway, 21 Fed. Rep. 358, does not sustain the opinion in this case. There the railroad had once been laid down upon the street, but had been taken up, and for a long time the street left unoccupied. In the mean time the legislature had granted the right to occupy the same street to another company, and it was under these circumstances that the learned District Judge held that the route had been abandoned.

This case was brought to this court, but the appeal was dismissed, the companies having in the mean time agreed among themselves.

This case not only stands alone, but is contrary to the principles laid down in the books on this question. So far as we know it has never been followed, and our petition for rehearing shows many cases which oppose it in principle and deny its conclusions in analogous instances.

The only reason why the Cincinnati Inclined Plane Company continued to use Route 8 instead of the route directly granted to it in the ordinance of 1871 was because it believed that, under the act of 1877 it had the same unlimited right in Route 8 that it had in the license and privileges conferred upon it by the ordinance of 1871. Certainly it can not be denied that the city encouraged it in that belief.

Granting all that the learned Circuit Court of Appeals has said in reference to the non-applicability of the doctrine of estoppel against a municipal corporation where there is involved a franchise which can only be granted by ordinance, it would certainly seem that such a municipality could not be allowed to avoid the estoppel upon the one hand and to insist upon an abandonment upon the other. Thus, after 1884, when (as now decided) Route 8 had expired, the proper authorities of the city authorized the equipping of this whole line with electricity, and large amounts of money were raised and expended thereon. After the road had been thus equipped and the money thus spent the city claims that the franchise has expired—indeed, had expired before the work of improvement was begun. The company, it is held, can not plead in estoppel, and it is also held that the company can not even fall back upon privileges which were undoubtedly granted to it and to which it once had a clear right, because, it is said, by using the other line it has showed its intention, which is now held to be conclusive upon it, of abandoning the rightful line.

The Circuit Court of Appeals therefore leaves this petitioner in the following position:

There is a good mortgage executed in conformity with the law of Ohio upon the franchises of this company. These franchises embrace the right to go along certain streets. The company had two rights over some, and a single right over other of these streets. The court now holds that one of these rights has expired—had expired in fact before the mortgage was made—and that by the use of the right which had expired the company has abandoned the right which, if used, would have been entirely valid, and would be in existence at this very moment.

If a city can not be estopped against claiming that a franchise is outstanding in certain of its streets in the absence of an ordinance granting a right in those streets, it should surely at least be required to do a little equity, and not be allowed to claim the abandonment of the one right which has not been exercised because of the city's concurrence and encouragement in the exercise of the other right.

In the beginning of its opinion in this case the learned court said:

> "The grant of a right to enter upon and occupy a public street with the necessary tracks, poles, wires and equipment of an electric street railway is a grant of a typical easement in property, and as such is a contract right capable, in the absence

of express restrictions, of being sold, conveyed, assigned or mortgaged, and is, therefore, a right entitled to all the protection afforded other property or contract rights.

"Such a grant as we had occasion to decide in Detroit Citizens Street Railway Company v. Detroit, 22 U. S. A. 570–580, may be foı a term longer or shorter than the corporate life of the company receiving it; the duration of the estate being dependent upon the terms of the grant and the power of the grantor to make it. We then said that there was 'nothing in the nature of the property rights involved in a grant of an easement in the streets for street railway uses which distinguishes it from other property acquired by a corporation in the exercise of its franchises.'

"In New Orleans, etc., R. R. Company v. Velamore, 114 U. S. 501, it was held that a grant by a municipal corporation to a railway company of a right-of-way through certain streets of the city, with the right to construct its railway thereon and maintain and occupy them in its use, is a franchise which may be mortgaged and would pass to a purchaser at a sale under a foreclosure of the mortgage."

By the provisions of Section 4 of the act of 1852, under which the Cincinnati Inclined Plane Company was organized, it is enacted (omitting words not material):

> "Such corporation shall be authorized to construct, maintain, and operate a railroad between the points named in the certificate, commencing at or within and extending to or into any town, city, or village named as the place of the termini of such road."

In the very beginning of its history one terminus of this road was fixed in the city of Cincinnati, near the corner of Fifth and Walnut streets. (R. 68.) The other terminus was fixed first at Avondale, but was subsequently placed at a more remote point in the county. The company could reach these termini under section 12 of the act of 1852, either by agreeing with the city or by condemning a right over the streets. It is difficult to perceive how the right acquired in one way would be any more sacred than the right acquired in the other. If a right to acquire in either way is a property right not distinguishable from other property acquired by a corporation in the exercise of its franchises, then how does it come that this company has lost its right to reach its terminus at Fifth and Walnut? The only answer is that a mutual mistake having been made, the company reached this terminus by the use of Route 8. It can no longer so reach it.

Under these circumstances is it possible to infer any intention upon the part of the company to abandon its right to reach that terminus under the ordinance of 1871?

The city down to the year 1890 showed no disposition whatever to deny to the company the right to reach the terminus through Route 8. This right, however, being now denied to it, how is it possible to infer that the company has given up its contract right to reach that terminus under the express license granted to it in the ordinance of 1871?

It is obvious that the primal and controlling intention of the company has been to reach this terminus. It is not possible to argue that its choice of means, when it supposed it had such a choice, can be now construed into an abandonment of the purpose to reach the terminus by means of a right which it really had.

This, as we have said, is a most important question in this controversy, and one thus far fixed by no controlling or governing authority. Indeed, the principles of the cases cited by us in the petition for rehearing, and laid down in the beginning of the opinion of the learned Circuit

Court of Appeals, seem to us to be at absolute variance with the conclusion reached by the learned Circuit Court of Appeals on this subject of abandonment.

We therefore respectfully submit that we have here a case where great injustice is about to be done to many innocent people, and where questions of so large importance and so general interest are raised as to call upon this court for the exercise of its supervisory authority to set at rest the present divergence of opinion.

ALEXANDER POPE HUMPHREY,
Of Counsel.

E. A. FERGUSON,
ST. JOHN BOYLE,
GEO. M. DAVIE,
Counsel.

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OFFICE SUPREME COURT, U. S.
FILED
NOV 30 1896
JAMES H. McKENNEY,

Supreme Court of the United States.

THE LOUISVILLE TRUST CO., TRUSTEE,
Plaintiff,

against

THE CITY OF CINCINNATI,
Defendant.

On Application for Writ of Certiorari.

660

BRIEF FOR DEFENDANT IN OPPOSITION TO APPLICATION.

FREDERICK HERTENSTEIN,
Corporation Counsel City of Cincinnati,

J. D. BRANNAN,
J. C. HEALY,
Of Counsel.

W. H. ANDERSON & Co., Law Publishers, Cincinnati, Ohio.

SUPREME COURT
OF THE UNITED STATES.

THE LOUISVILLE TRUST CO. TRUSTEE, *Plaintiff*, *vs.* THE CITY OF CINCINNATI, *Defendant.*	On Application for Writ of Certiorari.

BRIEF FOR DEFENDANT IN OPPOSITION TO APPLICATION.

The history of this litigation is as follows: On August 19, 1864, the city council of Cincinnati established by ordinance a street railway route known as Route No. 8. On October 26, 1864, this route was awarded to Porteus B. Roberts. The statutes of Ohio regulating street railway grants gave to the council the right to prescribe the terms and conditions upon which the streets should be used for street railways, and the grant of Route No. 8 to Roberts was limited by the council to twenty years, and therefore expired in October, 1884.

On April 20, 1871, the Cincinnati Inclined Plane Railway Company was incorporated under an act of May 1, 1852, which provided for the incorporation of steam railway companies.

On June 16, 1871, the city council granted to this company the right to cross certain streets with its inclined plane structure. By the terms of the grant it was to continue only for twenty years, and it therefore expired in June, 1891.

On December 1, 1871, the city council granted to this company permission to lay a double surface track from the base of its inclined plane, on the north side of Mulberry Street, thence along Main Street to Liberty Street, thence west on Liberty Street to Walnut Street, thence south on Walnut Street to Fifth Street market-space.

The railway company never laid tracks in Liberty, or in Walnut, or in Fifth Streets, and has never used those streets under the ordinance of Dec. 1, 1871. About the time of the passage of this ordinance, said Route No. 8 having been previously sold at sheriff's sale, was bought by Messrs. Smith, Hill & Doherty, who were the owners of all the stock of the Inclined Plane Railway Company except a few shares. It was then decided not to lay tracks in Liberty, Walnut, and Fifth Streets, and to use them under the ordinance of December 1, 1871. Route No. 8, being an already constructed road, and reaching the same point, viz., Fifth Street, the Inclined Plane Company, therefore, merely laid double tracks in Main Street from Mulberry Street to

Liberty Street, connected their tracks with the tracks of Route No. 8, and by arrangement with Smith, Hill & Doherty, operated the inclined plane in connection with that part of Route No. 8 which ran from Liberty down Main to Court, thence on Court to Walnut, thence on Walnut to Fifth, thence on Fifth to Main, thence on Main to Mulberry.

On October 27, 1875, the city council granted to the Inclined Plane Company permission to use and occupy, for thirty years, certain streets on the hill from the head of the inclined plane to the corporation line of the city. This grant included a single track on Auburn Avenue, from Mason Street to Vine Street, there being already one track which had been laid on that avenue by the previous owners of said Route No. 8, and which had been used as a part of that route.

On March 30, 1877, the Legislature of Ohio passed an act authorizing inclined plane railway companies organized under the act of May 1, 1852, to "hold, lease, or purchase and maintain and operate such portion of any street railroad leading to, or connected with the inclined plane, as may be necessary for the convenient dispatch of its business, upon the same terms and conditions on which it holds, maintains, and operates its inclined plane."

On June 19, 1877, Smith, Hill & Doherty leased Route No. 8 perpetually to the Inclined Plane Company, with a privilege of purchase for a certain sum. The Inclined Plane Company continued to operate its inclined plane, the road on the top of the hill, described in the grant of Oct. 27, 1875, that part of the grant of Dec. 1, 1871, extending from Mulberry to Liberty Street, that part of Route No. 8 extending from Liberty Street on Main to

Court, on Court to Walnut, on Walnut to Fifth, on Fifth to Main, on Main to Liberty, and the single track on Auburn Avenue, laid as part of Route No. 8.

On December 12, 1890, the city of Cincinnati brought suit in the superior court of Cincinnati against the Inclined Plane Company for the recovery of car licenses claimed to be due under the grant of Route No. 8 to Roberts, and for car licenses claimed to be due upon the grant north of the inclined plane, and for an injunction to restrain the maintenance and operation of any tracks in Main, Court, Walnut, or Fifth Streets. After a trial upon the merits, the superior court in general term, on Oct. 21, 1893, enjoined the Inclined Plane Company from maintaining any of its said tracks, poles, wire, or said appliances in Main Street, Court Street, Walnut Street, or Fifth Street, and from operating any of its cars over any of the said tracks, and also from maintaining and operating more than one street railroad track on Auburn Avenue, between Main and Vine Streets, and stayed the operation of the injunction for six months, with liberty upon the part of the defendant to apply for an extension of such time. No application has ever been made for such extension, and the injunction has therefore been in full force and effect since April 21, 1894.

The Inclined Plane Company took the case to the supreme court, where the judgment of the general term of the superior court was affirmed on the 30th day of October, 1894.

On the 6th day of March, 1895, the Louisville Trust Company, trustee for the holders of mortgage bonds issued by the Inclined Plane Company, filed its bill of complaint in this case to obtain an injunction against the city of Cincinnati to prevent the city from interfering with the maintenance and operation of its railway.

W. A. Goodman, trustee for holders of bonds under a prior mortgage, and the Inclined Plane Railway Company filed petitions of intervention, praying for the same relief as the complainant. Answers were filed by the city, and after a trial upon the merits, the circuit court, on April 7, 1896, dismissed the complaint and the intervening petitions. In the meantime, after the trial and conclusion of this case, but before the decision of the circuit court had been announced, the Louisville Trust Company, on October 12, 1895, filed, in the circuit court, a bill for foreclosure of the mortgage held by it, and upon the same day, the Inclined Plane Company consenting thereto, the court appointed a receiver, who is still in possession of the road, and is operating it under the orders of the circuit court.

Upon appeal to the circuit court of appeals in the case at bar, that court agreed with the state court, and with the circuit court of the United States in finding that the rights granted under the ordinance establishing Route No. 8 had expired by limitation in 1884, and agreed with the circuit court in finding that the rights granted under the ordinance of June 16, 1871, to cross certain streets with the inclined plane, had expired in June, 1891. But the circuit court of appeals differed with the state court and with the circuit court in their holdings as to the rights acquired by the Inclined Plane Company under the ordinances of December 1, 1871, and Oct. 27, 1875, and held that the former was a valid grant in perpetuity, and the latter a valid grant until Oct., 1905, but that all of the route covered by the ordinance of Dec. 1, 1871, except the part between Mulberry and Liberty Streets, had never been accepted, or had been abandoned by the Inclined Plane Company.

The circuit court of appeals also held that notwithstanding the prohibition of section 720 of the Revised Statutes, the fact that the road was in the hands of a receiver appointed by the federal court would prevent the city from enforcing its rights under the injunction granted by the state court, even as to the streets occupied by Route No. 8 and as to the streets crossed by the inclined plane, and that the city must apply to the circuit court to obtain its rights as against the receiver. The circuit court of appeals, in concluding its opinion, said that the circuit court "might have directed the filing of an amended and supplemental bill in this case, setting up the pendency of the foreclosure suit and the action had therein, or ordered this to be filed as a petition in the other cause with leave to bring the City of Cincinnati in as a party claiming rights in the mortgaged property," and "That this, or such other course may be taken as the complainant may be advised, the decree will be reversed and remanded with leave to amend in the manner suggested, and for such further orders and decrees not inconsistent with the views here expressed."

The circuit court of appeals thereupon ordered, adjudged, and decreed that "the decree of the said circuit court in this cause be, and the same is hereby reversed, with costs, and the cause remanded to the court whence it came with directions to grant leave to amend and for further orders and decrees not inconsistent with the opinion of this court."

It thus appears at the outset that the decree of the circuit court of appeals, which the Louisville Trust Company desires to have reviewed by this court, is a decree reversing an order of the circuit court, dismissing its bill of complaint, and not a decree affirming the decree which denied to it the relief sought by the bill of complaint. It is, therefore, the opinion of the circuit court of appeals, and not its decree which the complainant seeks to have reviewed, since the decree itself is in favor of the appellant in the circuit court of appeals.

The only reported cases we have been able to find in which petitions for writs of certiorari to review a judgment of reversal of a final order of the circuit court were filed, are the cases of Chicago and Northwestern Railway Co. vs. Osborne and Same vs. Junod, 146 U. S. 355. In these cases the circuit court of appeals reversed the judgment of the court below and remanded the cases for further proceedings in accordance with its opinion, which held that, on the facts as they appeared, the jury should have been instructed to find a verdict for the defendant. The petitions for writs of certiorari were denied upon the authority of the cases of McLish vs. Raff, 141 U. S. 661, Rice vs. Sanger, 144 U. S. 197, and Meagher vs. Minnesota Thresher M'f'g Co., 145 U. S. 608, which were cases deciding that appeals or writs of error can only be taken from final judgments. The cases of Chicago and Northwestern Railway Co. vs. Osborne and Same vs. Junod, therefore, decide that a judgment of the circuit court of appeals, reversing the judgment of the circuit court, and remanding the cause for further proceedings, in accordance with the opinion of the appellant, is not a final judgment and is not such a judgment as can be reviewed by this court upon a writ of certiorari.

What effect the holding of this court in the case of American Construction Co. vs. Jacksonville Railway Co., 148 U. S. 372, has upon the decision in the cases of Chicago and Northwestern Railway Co. vs. Osborne and Same vs. Junod we do not know, as the last mentioned cases were not referred to in the case of American Construction Co. vs. Jacksonville Railway Co., and if it was the intention of the court to overrule them, such intention is nowhere expressed.

But, however this may be, we submit that the case at bar does not come within the class of cases in which this court should exercise its power to issue a writ of certiorari in advance of a final judgment, because the exercise of this power is not "necessary to prevent extraordinary inconvenience and embarassment in the conduct of the cause." The decree of the circuit court dismissing the bill is reversed, the cause is remanded with leave to complainant to amend its bill as suggested by the circuit court of appeals by setting up the pendency of the foreclosure suit and the action had therein, or otherwise as the complainant may be advised. The complainant may also in accordance with the opinion of the circuit court of appeals file its bill of complaint herein as a petition in the foreclosure case and bring in the city as a party claiming rights in the mortgaged property.

Moreover, the property is still in the possession of a receiver appointed by the circuit court, and the circuit court of appeals has held that the city can not enforce its injunction against the maintenance and operation of the road even in the streets to which the right of the company has expired, but that the city must make its application to the circuit court to obtain its rights.

SECOND.

Does this case belong to the class of cases in which this court according to its previous decisions will exercise its power to issue writs of certiorari? This court held in American Construction Co. vs. Jacksonville Railway Co., 148 U. S. 372, that its authority under section 6 of the Act of March 3, 1891, is "a branch of its jurisdiction which should be exercised *sparingly* and *with great caution*, and only in cases of *peculiar gravity* and *general importance*, or *in order to secure uniformity of decision*," page 383. And the court illustrated the meaning attached by it to the words just quoted by referring to the only cases in which, up to that time, it had exercised this jurisdiction—the case of Lau Ow Bew, 141 U. S. 583, and 144 U. S. 47, which "involved a grave question of public international law, affecting the relations between the United States and a foreign country," and the case of Fabre, Petitioner, an admiralty case, "which presented an important question as to the rules of navigation," and in which case there had been a dissenting opinion by one of the circuit judges sitting in the circuit court of appeals. (53 Fed. 288; 3 C. C. A. 534.)

And in the case of American Construction Co. vs. Jacksonville Railway Co., itself, the court overruled the petitions for certiorari on all the other grounds mentioned in the petitions, some of which raised questions conceded by the court to be important, and granted a rule to show cause why the writ should not issue solely on the ground, that it was claimed that Judge Pardee was disqualified by statute from sitting on the hearing in the circuit court of appeals, and for the purpose only of determining this question. This question the court said was a "novel and important one, deeply affecting the administration of justice in the circuit court of appeals," page 387. These three cases, being the only reported cases in which this writ has been granted, are, therefore, to be looked to for the principles upon which the court will act upon such petitions.

It is easy to see that an international question is one of peculiar gravity and general importance. Also, that the rules of navigation which are, in part at least, prescribed by the laws of the United States, and are interpreted and applied in cases exclusively within the jurisdiction of the federal courts, and which apply to foreign vessels as well as to public and private vessels of the United States, present a question of general importance; also that the qualification of the judges of a federal court is a question of peculiar gravity and general importance. We now turn to the other cases in which petitions for writs of certiorari have been denied in this court to ascertain, if we may, what kind of questions have, by implication from the fact of such denial, been deemed by this court not to be questions of "peculiar gravity and general importance." We find, by reference to the memorandum decisions in the thirteenth, fifteenth, and sixteenth volumes of the Supreme Court Reporter, that more than eighty petitions for certiorari have been filed in this court, and that, up to the end of the last term only three had been granted, namely, the cases already referred to—Lau Ow Bew's case, the case of Fabre, Petitioner, and the case of American Construction Co. vs. Jacksonville Railway Co.

The citations in the Supreme Court Reports, in all but two or three cases contain references to the reports in which are to be found the decisions of the circuit court of appeals in those cases, and we can thus ascertain the nature of the questions involved in those cases. They are of great variety and many are of great importance, not only by reason of the amounts, but also from the principles of law involved therein.

In Billings vs. Aspen Mining and Smelting Co., 13 S. C. Rep. 1043, there was a question whether mining rights constitute an exception to the rule that the right to defeat a title on the ground of alienage is reserved to the government alone. section 2319 of the Revised Statutes providing that an alien can not be a locator. (52 Fed. 250.) Walreth vs. Champion Mining Co., 16 S. C. Rep. 1208, involved a question of mining rights under section 2322 Revised Statutes (72 Fed. 978.)

In New Chester Water Co. vs. Holly M'f'g Co., 13 S. C. Rep. 1050, there was a question whether public policy renders invalid a contractual vendor's lien upon the pumping engines of a water company, and also a question as to the controlling effect under the Pennsylvania decisions of an intent that the engines should not become a part of the realty. (53 Fed. 19.)

American Water-Works Co. vs. Farmers' Loan and Trust Co., 16 S. C. Rep. 1198, involved the question of the power of a corporation organized in one state to mortgage property in another state. (73 Fed. 956.)

Barber Asphalt Paving Co. vs. Harrisburg, 16 S. C. Rep. 1198, concerned the question of whether the receipt of invalid assessments in payment for work was a discharge of the liability of the city. (64 Fed. 283.) This question has arisen in many cases in the courts of a number of the states, and has, therefore, much importance.

Rouse vs. Hornsby, 16 S. C. Rep. 1205, involved the important question whether a state statute abrogating the rules of the common law regarding the negligence of a fellow servant applies to receivers operating railroads, and also the question as to whether the issues in a cause of action at law set up by intervening petition in a chancery case can be sent to a jury. (67 Fed. 219.)

In re Gardiner, 13 S. C. Rep. 1047, the question was whether goods arriving in the port of entry on October 4, 1890, but not entered until October 6, 1890, pay the duty prescribed by the Act of October 1, 1890, or the duty under the prior act of March 3, 1883 (53 Fed. 1013). The question of the day upon which the act of March 1, 1890, went into effect for duty purposes must have affected many persons.

A number of the cases in which petitions for certiorari were filed involved important questions of jurisdiction or of practice in the federal courts. Among these is the case of United States vs. Fowkes, 13 S. C. Rep. 1053, which involved the question of the jurisdiction of a circuit court to review the decision of the district court releasing on habeas corpus a person arrested in Pennsylvania for violation of the interstate commerce act and held for removal to Missouri to answer to an indictment there found, and also a question as to the jurisdiction of the district court. (53 Fed. 13.)

Also the case of United States ex rel. vs. Arnold, 16 S. C. Rep. 1208, in which was involved the question of the binding effect of a waiver of jury, though not in conformity to the Illinois statute on the subject, and also the question whether the power of the federal court to issue a writ of capias ad satisfaciendum was affected by an Illinois statute limiting the right to process against the person. (69 Fed. 987.)

There was also a number of cases concerning collisions of vessels, such as The Iron Chief, 15 S. C. Rep. 1040, which was a collision between a steamer and a sailing vessel (63 Fed. 289); the Montclair, 15 S. C. Rep. 1041, a collision between a ferry boat and a lighter (67 Fed. 156); the Michigan, 15 S. C. Rep. 1041, a collision between a steamer and a sailing vessel (63 Fed. 280); Julius Ueberweg vs. La Comp. Gen. Transatlantique, 15 S. C. Rep. 1043, a collision between ocean steamships (60 Fed. 461); Law vs. The Trave, 16 S. C. Rep. 1203, a collision between a steamship and a sailing vessel (68 Fed. 390).

Several of these cases involved the rules of navigation, as did also the case of Singlehurst vs. La Comp. Gen. Transatlantique, 13 S. C. Rep. 1052, a case of collision between two foreign steamships (53 Fed. 293). This case was decided by the same judges who decided the case of Fabre vs. Cunard Steamship Co., which is the same case referred to in the opinion of this court as Fabre, Petitioner (148 U. S. 383), and the report of it in the Federal Report follows immediately after the report of the Fabre case.

Both cases involved the application of rules of navigation, but in the second case the court was unanimous in its opinion. The fact that the petition was granted in the Fabre case and denied in the Singlehurst case would seem to indicate that this court regarded the dissent of one of the judges in the Fabre case as a circumstance of weight in determining the exercise of its discretion, and indeed this fact is expressly mentioned by this court in its opinion in American Construction Co. v. Jacksonville Railway Co. (148 U. S. at page 384.)

Possibly, after permitting a petition for certiorari to be filed in one case involving an important question as to the rules of navigation, the court considered that the object to be accomplished, namely, the interpretation and application of those rules would be attained by the decision in the case already admitted. At all events, such a determination would be in conformity to the rule that only cases involving questions of *general* importance should be brought up for review upon certiorari, since one case would settle the question for all future cases. It is not the importance of the case, or of the questions to the litigants in the particular case, but the importance to the general public of the United States which seems to be the test. It would be unnecessarily tedious to refer specially to all the other cases in which petitions for writs of certiorari have been denied, but they have involved many subjects of great importance to the litigants, and to the science of law. Among the questions involved were Patents, Trade Marks, Laches, Conflict of Laws, Estoppel by Judgment of State Court, Municipal and County Bonds, Priority of Mortgage and other Liens, Constitutional Law, Salvage, Charitable Trusts, Limitations, Effect of Decisions of State Court, Negligence, Trusts, Railroads. And in the case of In re Woods, Petitioner, this court held that the questions (1) whether it is settled law in the State of Minnesota that a judgment of dismissal in a former suit was not a bar to a second suit on the same cause of action; (2) whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of a case, do not fall within the category of questions of such gravity and general importance as to require the review of the conclusions of the circuit court of appeals in reference to them (134 U. S. 202).

No valid argument in favor of granting a writ of certiorari in this case can be based on the nature of the questions involved, which was not of equal force upon the petition for the writ in the case of Detroit Citizens' Street Railway Co. v. City of Detroit, in which case this court denied the petition (16 S. C. Rep. 1200; 163 U. S. 683). That case involved questions of the same general character as those in this case. The litigation was between a municipal corporation and street railway companies, and concerned the validity and duration of street railway franchises, and of rights to use the streets of the city for street railway purposes. The Statutes of the State of Michigan, and the ordinances of the City of Detroit were under consideration, were discussed and interpreted. The case involved large sums of money, and affected the rights, not only of the street railway company, but of the holders of mortgage bonds to a large amount, and the questions involved were of the greatest importance, not only to the parties to the case, but also to the citizens of every municipal corporation in the State of Michigan, since the case required the court to construe the statutes of the state relating to street railway franchises and grants of the right to use the streets (64 Fed. 628).

The questions in the case at bar depend, for their ultimate solution, upon the construction of the statutes of Ohio, and of ordinances of the City of Cincinnati, and they are of local, not of general importance.

As we understand the previous rulings of this court the amount involved in the case is of no importance upon the question of granting the writ of certiorari. Several of the collision cases referred to involved large sums.

The case of C. H. & D. R. Co. v. KcKeen, in which the writ was denied (15 S. C. Rep. 1038), involved nearly nine hundred thousand dollars (64 Fed. 36).

The case of Elder v. McClaskey, 16 S. C. Rep. 1201, involved a large amount of real estate worth over a million and a half dollars (70 Fed. 529).

The Detroit Street Railway case, above cited, involved the rights of holders of mortgage bonds to the face value of three million dollars, in addition to the value of the capital stock of the street railway company (56 Fed. 867).

THIRD.

The petitioner claims (page 24 of its petition) that this case should be reviewed by this court in the interest of uniformity of decision, and to support this contention its counsel contend that there is a diversity of ruling by different federal courts upon some questions involved in this case. We submit, that when the cases cited to support this claim are examined in the light of the statutes of the various states where the cases arose, it will be found that no such conflict really exists. The nature of the powers and rights possessed by corporations depend upon the statutes of the states where they are incorporated. In some states, not only is the franchise to be a railroad corporation and to exercise certain kinds of power, conferred directly by the Legislature, but the right to occupy streets is also directly granted by the Legislature, either by naming the streets specifically or by some general designation of the streets to be so occupied and used.

In other states the Legislature only confers the power to be a corporation and to exercise corporate powers of the specified kind, while the power to grant or withhold an easement in the streets, or to impose terms and conditions upon the grant and exercise of such an easement, is given by the state to the municipal corporation where the company is to operate. The State of Ohio belongs to the latter class of states, as we shall hereafter more specifically show.

The petitioner complaims of the decision of the Circuit Court of Appeals upon three points.

1st. That the privilege granted by the ordinance of June 16, 1871, to cross streets with the inclined plane, which was, by its terms, duly accepted by the Inclined Plane Company, to expire in twenty years, did in fact expire in June, 1891.

2d. That the easement granted by the city to Roberts to maintain and operate Route No. 8, which was limited to twenty years, and therefore, by its terms, expired in October, 1884, did not, by its transfer to the Inclined Plane Company, become by the mere force of the statute of March 30, 1877, a perpetual easement in the streets covered by Route No. 8.

3d. That the right to occupy and use the streets named in the ordinance of December 1, 1871, had either never been accepted or had been abandoned by the company, except Main Street from Mulberry to Liberty Street.

We shall consider these questions in the above order.

1st. As to the Inclined Plane:

It is claimed that because the company has perpetual existence the city could not lawfully limit the term of the grant of the right to cross streets with the Inclined Plane. But section 12 of the act of 1852, the very act under which the Inclined Plane Company was incorporated as a steam railroad, provided that "if it shall be necessary in the location of any part of a railroad, to occupy any road, street, alley or public way, or ground of any kind or any part thereof, it *shall be competent* for the *municipal* or *other corporation* or public officers, or public authorities, owning or having charge thereof, *and the railroad company* to *agree* upon the *manner* and upon the *terms and conditions* upon which the same may be used or occupied."

The fact that upon failure to agree the company is given the right to condemn does not limit its competency to agree upon "terms and conditions" of the use and occupancy of the streets. Being expressly authorized to agree upon terms and conditions the company might well prefer to take a right limited as to time rather than run the risk of being adjudged to pay damages to the city for the appropriation of a perpetual right of way. There would be no equity in permitting the company to enjoy the privileges granted by the city and at the same time allow it to disregard the condition upon which the privileges were given, and to which the company consented in accepting the grant. To grant an injunction against interference by the city with the operation of the inclined plane would be to make a judicial grant of a perpetual right to cross and occupy streets without agreement or condemnation according to law and without giving the city an opportunity to establish its damages for the appropriation. It is claimed that there would be no damages, but it is difficult to see how the court can decide that question which the city has a right to have submitted to a jury.

But counsel for the petitioner say (pages 37 and 38 of their brief) that this question is "rendered entirely unimportant by the facts" in the case because the company owns the land on the sides of the street, and that as owners of adjacent property the title to the highway is in it, "except so much as is necessary for the public to secure a passage over it, the right to mines and minerals under its surface, equally retains to him the right to the air above the surface, provided that no structure be erected in such a way as to impede the natural use of the highway for travel." This claim affects only the question of the amount of damages which might be awarded to the city in condemnation proceedings, and does not touch the question of the obligation of the company to submit to the terms of its own contract with the city.

But the claim is also without foundation in law, since in Ohio a city has not a mere easement in its streets, but owns the title to them in fee.

In Cincinnati St. R'y Co. v. Smith, 29 O. S. 291, the Supreme Court said "*The city holds the fee of the streets in trust for the uses intended*, and the care, supervision and control of them is expressly imposed upon the council * * * "These sections taken together show that the state, in its sovereign character, has reserved no property interest in the streets in question. The revenues and profits that are to accrue from the use of the streets in the mode contemplated will be the private property of the city in which the state has no interest whatever." (pp. 305, 306.)

It is argued on behalf of the petitioner that there is a wide difference of opinion between the Courts of the Seventh and Sixth Circuits upon the validity of restrictions in the matter of time imposed by municipal authorities upon grants of the right to use streets for railway purposes. The cases cited in support of this argument are the cases of Detroit Citizens Street Railway v. Detroit, 22 U. S. A. 570, and Citizens Street Railway v. City Railway, 64 Fed. Rep. 647. But an examination of these cases shows no such difference of opinion between the two circuits because the statutes under which the question arose are entirely different upon this point.

In Detroit Citizens Street Railway v. City Railway the statute provided that no corporation "shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulations, and upon such *terms and conditions* as said authorities may from time to time prescribe," 22 U. S. A. at page 587. Under this statute the court held that "the term for which such a grant may be made is just as much a matter about which municipal discretion is to be exercised as any other of the terms of the grant," (p. 599), and that therefore the city could grant a perpetual right or easement to a corporation having but a limited life. The same construction was put by the court in this case on the Ohio statute.

Section 12, of the Act of 1852, relating to steam or general traffic railroads, made it competent for the city and the railroad company to agree "upon the manner and upon the terms and conditions" upon which the streets might be occupied and used. In like manner the first statute passed by the Legislature of Ohio which related to street railways, specially provided that "The city council shall prescribe by ordinance the manner and the terms and conditions upon which the streets and avenues of said city may be used or occupied by street railroads." Act March 3, 1860, Sec. 16, 57 Ohio Laws 16.

The first statute passed for the incorporation of street railroad companies made a like provision. Section 5 of that act provided that "it shall be competent for the city council or corporate authorities of any city, town or village, to agree with any street railroad company, organized in pursuance of this act, or with any individual or company of individuals, desiring to construct a street railroad in such city, town or village, upon the manner and upon the terms and conditions upon which such corporation, individual or company of individuals, shall construct and operate a street railroad in such city, town or village." Act of April 10, 1861, 58 Ohio Laws, 66. These provisions have continued to be a part of the Statutes of Ohio in substantially the same form to the present time. Rev. St. 1880, sections 2501, 2502, 3438, 3443. And it has been the universal practice in Ohio for the city council to limit the term of all street railroad grants. The general ordinances of Cincinnati passed both before and after the act of March 3, 1860, limited all street railway grants to twenty years. (Record, pp. 131, 141.)

It is further to be noted that in Ohio the right to construct and operate street railroads may be granted by the municipality to *individuals*, and it could hardly be claimed that a grant to an individual could not be limited as to the time of its duration and there is every reason that it should be so limited. The complications which would arise after the death of a grantee who was an individual would be greatly aggravated if the city were unable to limit the time for which it made the grant. The statute makes no distinction between grants to individuals who are mortal and grants to corporations which have perpetual life, and in both cases alike the power is conferred upon the municipal corporation to impose the terms and conditions for the use of the streets for street railroads.

We come now to the case of Citizens Street Railway v. City Railway, 64 Fed. 647. This case was decided *not* by the *Circuit Court of Appeals*, *but* by *the Circuit Court*, and therefore can not be regarded as presenting a conflict of authority between two appellate courts. It is true, however, that the Circuit Judge and the District Judge both sat in the case, and that they differed upon the questions as to the authority of the city council to impose a time limit upon the grant in question, but the remarks of the judges upon this point were *obiter dicta*, as the time limited by the city council had not yet expired. But even the opinion of the Circuit Judge, who denied the power of the city to limit the time of the grant, is not in conflict with the ruling in the case at bar, and in the case of Detroit Citizens Street Railway v. City Railway, because the statute of Indiana is very different from those of Ohio and Michigan. That part of the Indiana statute relating to the question of the consent of the municipal authorities is to be found in section 12, which is in these words:

"Sec. 12. Nothing in this act contained shall be construed so as to take away from the common council of incorporated cities the exclusive power now exercised over the streets, highways, alleys, and bridges within the corporate limits of such cities; and all street railroad companies which may be organized under the provisions of this act shall first obtain the consent of such common council to *the location, survey, and construction* of any street railroad through or across the public streets of any city before the construction of the same shall be commenced." Act of June 4, 1861, I Davis Rev. St. Indiana, 757.

It is to be noticed that while the 12th section of this act requires that street railroad companies shall first obtain the consent of the common council to "the location, survey, and construction" of any street railroad through or across the streets, there is no provision that the council shall prescribe the "terms and conditions" upon which the streets may be used or occupied by street railroads, or that council and the company shall be "competent" to agree upon such terms and conditions.

Counsel for the petitioner also cite the case of Africa v. City of Knoxville, 70 Fed. Rep. 729.

This also was a decision of the Circuit Court only, and it has lately been reversed by the Circuit Court of Appeals. The remarks of the Circuit Judge upon the question of the power of counsel to limit the duration of the grant were really not necessary to the decision since the court construed the intent of the council to be to grant its consent during the existence of the franchise to the use of which in its streets it was consenting, and that it did not contemplate any company or the name of a company as distinct from the franchise, and that, therefore, the right passed under the statute of Tennessee to a company with which the original grantee had been consolidated (p. 739.)

We call attention also to the fact that the statute of Tennessee providing for the incorporation of street railroads differs from the statutes of Ohio and of Michigan in that the word "conditions" is not contained in the section providing for the consent of the city upon this subject. Section 1921, Milliken & Vertrees Code, reads as follows: "Provided that no one of the streets of said city shall be used by said company, nor shall any rails be laid down until the consent of the city authorities has been first obtained, and an ordinance shall have been passed prescribing the terms on which the same may be done."

It is also to be observed that section 1920 seems to authorize the naming in the charter of the streets upon which the company is to operate its railroad, which might be regarded as giving to the company a direct grant from the Legislature to use the designated streets, subject to the right of the city, to prescribe not terms *and conditions*, but terms alone, on which the streets shall be used.

Nor does the case of Baltimore Trust Co. v. Mayor of Baltimore, 64 Fed. Rep. 153, also cited by counsel for petitioner, touch the question under discussion. The question of the right of council to limit the duration of the grant to use the streets was not involved at all. The question was as to the right of council, after having by ordinance granted a privilege for a double track, unlimited as to time (except that within two years after any successive period of fifteen years the city should have the right to buy out the railroad company), to repeal the ordinance and to restrict the company to the use of a single track as to a part of the route.

We have thus considered all the cases cited in behalf of the petitioner to sustain its contention that the writ of certiorari should be granted in the interest of uniformity of decision, and have shown that there is no lack of uniformity of decision, but that, on the contrary, the meaning of statutes which grant to municipal corporations the right to impose "terms and conditions" upon the occupancy and use of streets by railroad companies has been uniformly interpreted in the same way. Only two cases have arisen in which the statute contained those words, and both of the cases were decided by the Circuit Court of Appeals. Of the other three cases cited, one—Baltimore Trust Co. v. Mayor of Baltimore, 64 Fed. Rep. 153—involved no question as to limitation by council on the duration of the privilege.

In another case—the Citizens Street Railway v. City Railway, 64 Fed. Rep. 647—the statute did not contain the words "terms and conditions," and in the third case—Africa v. City of Knoxville, 70 Fed. Rep. 729, the statute did not contain the word "conditions," and all three of these last mentioned cases were decided not by the Appellate Court but only by the Circuit Court.

Since the powers of a corporation depend upon the statutes of the particular state in which it is created, it is difficult to see how diversity of decision can arise between two courts upon the question of the extent of the powers of the corporation unless both courts are construing the same statute, or two statutes containing the same provisions. As we have pointed out the only court (the Circuit Court of Appeals for the Sixth Circuit) which has had occasion to construe two such statutes has put the same construction upon both of them.

2d. As to Route No. 8.

The question is whether after a grant of an easement to use the streets of a city has been made to an individual (Porteus B. Roberts), which grant was lawfully limited to twenty years, such grant is enlarged into a right to use the streets in perpetuity by force of an assignment to a corporation organized under the act of March 30, 1877 ?

Four courts have held that such a grant is not so enlarged. The decisions of the Superior Court of Cincinnati, The Supreme Court of Ohio, The Circuit Court of the United States, and the Circuit Court of Appeals are in entire harmony upon this point.

We do not intend to burden this court with all the arguments upon this subject which were made in the Circuit Court of Appeals, but only to advert briefly to some of them.

The Inclined Plane Company was incorporated under the act of May 1, 1852, which provided for steam or general traffic railways, and not for street railways. Under that act the company acquired no power to hold, acquire or operate a street railway. Potts v. Elevated R. R. Co., 161 Pa. St. 396; Commonwealth v. N. E. Elevated Ry. Co., 161 Pa. St. 409.

It was therefore necessary to have some further legislative action before the Inclined Plane Company could acquire and operate Route No. 8. It is claimed that this was effected by the act of March 30, 1877. But this act, while conferring power to hold, lease or purchase, maintain and operate portions of street railroads, did not confer upon or grant to the Inclined Plane Company any street railway or part thereof, or any easement in any city street.

The terms and conditions upon which such rights should or could be *acquired* by the Inclined Plane Company from the city or a grantee of the city were not fixed by the act. There was no requirement in the act that the city should grant permission to use its streets, or that the city should consent to the assignment of existing grants upon any terms fixed by the act. The claim is that because the company by the act of March 30, 1877, acquired the power to maintain and operate street railroads upon the same terms and conditions on which it holds, maintains and operates its inclined plane, therefore any grant obtained by the company by assignment from the original grantee became discharged of all the conditions and terms imposed upon the original grantee by contract between him and the grantor, although by section 9 of the general ordinance of 1859 (Record, p. 129), to which the grant to Roberts was made subject (Record, p. 154), Roberts was prohibited from assigning or transferring the franchise without first obtaining the consent of the city council thereto, and although when Roberts did assign to the Mt. Auburn Railroad Company, one of the predecessors in ownership of the Inclined Plane Company, the city only authorized him "to tranfer all *his* rights and interest in said Route No. 8" (Record, p. 158). We submit that this claim is as unreasonable as it would be to contend that power conferred by statute upon a corporation to hold perpetual leaseholds would enlarge a lease for years into a perpetual lease, if the corporation should acquire it by assignment from the lessee. The construction claimed by the petitioner for the act of March 30, 1877, involves also the removal of all other restrictions, and of all the obligations imposed by contract upon the original grantee of Route No. 8, such as car licenses to be paid to the city, and the limitation on the rates of fare to be charged (Record, pp. 155, 156, 159), since none of these things were required by the act of 1852 of companies incorporated under that act.

Such a construction should never be put upon the act unless it is imperative from the plain language of the act. But no such intention is expressed in the act, and all the rules of construction applicable to legislative grants to a corporation are against the implication of any such intention, the rule being well settled that such grants are to be construed against the grantee and in favor of the public.

Central Transportation Co. v. Pullman Car Co., 139 U. S. 49.

Slidell v. Grandjean, 111 U. S. 437, 438.

Oregon Railway v. Oregonia Railway, 130 U. S. 26, 27.

Stein v. Bienville Water Supply Co., 141 U. S. 80.

People ex rel. 3d Ave. R. R. v. Newton, 112 N. Y. 396.

Minturn v. Larue, 23 How. 435.

Western Paving and Supply Co. v. Citizens St. R. Co., 128 Ind. 525, 530.

Penn. R. Co. v. Canal Commrs., 21 Pa. St. 22.

Fertilizing Co. v. Hyde Park, 97 U. S. 659 666.

N. O. & C. R. R. Co. v. City of New Orleans, 34 La. An. 447.

3d. As to the abandonment of part of the route covered by the ordinance of December 1, 1871.

The Inclined Plane Railway Company petitioned the city council to grant to it permission to use and occupy with a double track the following streets, viz: "Commencing on the upper side of Mulberry at the head of Main Street; thence south on Main Street to Liberty; thence west on Liberty to Walnut; thence south on Walnut to Fifth Street market-space." (Record, p. 68.) This route contemplated going from and returning to the Inclined Plane by the same streets.

On December 1, 1871, the council passed an ordinance granting this permission, but imposed therein certain obligations on the Inclined Plane Company as to the location of the tracks, taking up and relaying pavements, future change of grade of the streets, payment to the owners of existing tracks of a proportion of the cost of laying and keeping said tracks in repairs, laying and keeping in repair a wooden pavement between the rails, motive power to be used, rates of fare to be charged, and indemnifying the city against any damages for any injury to persons or property on account of the grant made under said ordinance. (Record, pp. 68, 69.) Although this ordinance contained all these terms and conditions, the record nowhere shows any acceptance by the Inclined Plane Company. We are therefore obliged to look at the acts of the company to infer an acceptance. Booth on Street Railways, Sec. 31. And we find no acts implying an acceptance of the ordinance with its restrictions and burdens, except the laying and using of tracks on Main Street from the inclined plane on Mulberry Street to Liberty Street, and no occupancy or use of any of the other streets down to the present time, a period of nearly twenty-five years, or nearly twenty years up to the time of the filing of the petition by the city against the company in the Superior Court of Cincinnati. So much for the question of acceptance. The fact that there was no acceptance by the Inclined Plane Company of the right to use the other streets with the obligations thereto attached, either by writing or by any acts is also of weight in considering the question of abandonment of that part of the route.

Abandonment is a question of fact, and the record fully sustains the finding of the Circuit Court of Appeals upon this point. Not only was there the inference naturally and fairly to be drawn from the failure to accept and the failure to use for so long a time any of the streets except Main Street from Mulberry to Liberty, but the testimony showed beyond a doubt that the company soon after the passage of the ordinance of December 1, 1871, gave up all idea of using any of the streets except Main Street from Mulberry to Liberty, and from that time never intended or expected to use them, because the company found it more desirable to use part of Route No. 8, an already constructed line, to reach the same point in the center of the city intended to be reached by the route described in the ordinance of December 1, 1871. Mr. Doherty, the secretary and for a long time the superintendent of the Inclined Plane Company, testified as follows (p. 47):

"Q. 25. State what street railway the Cincinnati Inclined Railway Co. *held* and was maintaining and operating and *owned* from the foot of the inclined plane at the head of Mount (Main) Street.

A. The street railway I have heretofore described from the foot of the inclined plane to the postoffice" (the postoffice was on Fifth Street market-space).

The street railway "heretofore described" by Mr. Doherty is stated on page 45, in answer to Question 13, and was made up of the double tracks from Mulberry to Liberty on Main Street, authorized by the ordinance of December 1, 1871, and for the rest of the way of the tracks laid under the ordinance establishing Route No. 8.

Mr. Doherty further testified (Record, p. 51):

"Q. 68. State whether or not any tracks were laid on Liberty Street between Walnut and Main, or on Walnut Street between Liberty and Court Streets, by your company since the ordinance of 1870 (1871).

A. No, sir.

Q. 69. Has there, at any time, been any track laid on Liberty between Walnut and Main, or on Walnut between Court and Liberty, by your company since 1871?

No, sir."

Again (p. 53): "Q. 87. Why was it that the Inclined Plane Railway Company did not avail itself of the ordinance of 1871, to lay tracks on Liberty Street and on Walnut Street?

A. *Because the Mt. Auburn Road* (this was Route No. 8) *came into the market and we bought that road in preference to laying the other.*

Q. 88. You were the owners of Route No. 8, you who were interested in the Inclined Plane Railway Company; you acquired Route No. 8 under the deeds that have been given in evidence?

A. Yes, sir.

Q. 89. And so used that *instead of* using the rights passed by the ordinance of 1871?

A. Yes, sir."

It also appears that in the trial of the suit of the city against the Inclined Plane Company in the Superior Court of Cincinnati, in January, 1892, Mr. Doherty testified as follows:

"Q. State whether or not any tracks were laid on Liberty Street between Walnut and Main, or on Walnut Street between Liberty and Fifth Streets, by your company since the ordinance of 1873 (1871) was passed.

A. We laid no track on Liberty between Main and Walnut, none on Walnut between Liberty and Court. Our old track runs in on Walnut at Court.

Q. When did you lay any on Walnut?

A. You are right. There was an old track there.

Q. That was an old track there which was being used as a part of *Route* 8, *and is now used as a part of that line?*

A. Yes, sir.

Q. Has there at any time been any track laid on Liberty Street between Walnut and Main, or on Walnut between Court and Liberty?

A. No, sir.

Q. Has there at any time been any track upon those parts of Liberty and Walnut Streets used by your company?

A. No, sir." (Record, p. 216.)

Again, upon the same trial, Doherty testified:

"Q. When were the tracks from the foot of the Inclined Plane at Mulberry Street to Liberty Street completed?

A. I don't know whether they were completed before the purchase of the old Mt. Auburn road or not. We had the grant of the Walnut Street road and were getting ready to construct it, when this Mt. Auburn road came into the market and was to be sold at some court proceedings, and we put ourselves into some communication with Mr. Wilson, who appeared to be a bondholder of the road, and *instead of building our own road entirely we bought this road.* The thing was all mixed up, and it might have lapped one way or the other. I can't tell you exactly.

Q. Was it before or after you purchased from Wilson that you built down to Liberty Street?

A. Well, my impression was—I don't know. I can't make up my mind whether it was before or after. I don't know. It is a good while ago." (Record, p. 219.)

In giving his testimony in the case at bar, Mr. Doherty succeeded in making more clear the relative dates of the laying of the track in Main Street, and of the purchase of Route No. 8. He testified (p. 54): "Q. 90. When did you build the double track from Mulberry down to Liberty?

A. I suppose during 1872, just immediately after we purchased that road, very shortly afterwards. We ran round the hill a while. It was after Smith, Hill & Doherty purchased the Mt. Auburn Road.

Q. 91. Then it was some time in 1873 or thereafter.

A. Yes, sir.

Q. 92. Now, between the times of the completion of the Inclined Plane and the time when Smith, Hill &

Doherty bought Route No. 8, was there any approach to the Inclined Plane by a double track.

A. There was not.

Q. 93. And people who used to go up had to walk to the foot of the Inclined Plane.

A. Yes, sir."

This testimony, which is uncontradicted, shows conclusively that the Inclined Plane Company found it more to its interest to acquire and use Route No. 8 as a means of getting from Liberty and Main Streets to the center of the city than to build and use tracks on Liberty and Walnut Streets, and that the company abandoned all intention or expectation of availing itself of the privilege to lay tracks on Liberty and Walnut Streets.

But counsel for the petitioner say that the company's acts and the testimony of its secretary should not be held to be an abandonment of the part of the route established by the ordinance of December 1, 1871, because the company acted upon the mistaken belief that it acquired a perpetual right in the streets covered by Route No. 8. This is a curious claim. It amounts to saying that although the evidence shows a clear purpose to abandon a grant, the right to it should be revived, when it is discovered after years of litigation, that something else which the company deliberately chose in preference was less valuable to the company than the abandoned grant would have been. It is not a claim that the grant in question had not in fact been abandoned, but that it should be called into life again because now needed by the company.

The statement in the brief of counsel for the petitioner that the selection by the company of Route No. 8 as a means of reaching Fifth Street was "a mutual mistake," is wholly without foundation. The city had nothing whatever to do with this choice by the company, and there is no evidence whatever that the city in any way encouraged the company to acquire and use Route No. 8, or to give up the privileges granted by the ordinance of December 1, 1871. The question of estoppel against the city by reason of permitting the change from horse power to electricity as a motive power we shall consider later.

Counsel for the petitioner say that the question of abandonment is "one thus far fixed by no controlling or governing authority," and that the principles of the cases cited by them in the petition for rehearing and laid down in the beginning of the opinion of the Circuit Court of Appeals seem to them to be at absolute variance with the conclusion reached by that court on the subject of abandonment (pages 50–51 of petitioner's brief).

But the very cases cited by them on page 43 of their brief sustain the conclusion of the Circuit Court of Appeals. In Raritan Water Power Co. v. Veght, 21 N. J. Eq., 463, it was held that "abandonment is a question of intention: nonuser is a fact in determining it, but is not, even for twenty years, conclusive evidence in itself of an abandonment. Its weight must depend upon the intention to be drawn from its duration, character, and accompanying circumstances" (p. 480).

Again in Utt v. Frey, 106 Cal. 392, it was held that "*abandonment is a question of fact to be determined by a jury or the court sitting as such.* Yielding up possession and nonuser is evidence of abandonment, and under many circumstances sufficient to warrant the deduction of abandonment. But it may be rebutted by any evidence which shows that notwithstanding such non-user or want of possession, the owner did not intend to abandon" (p. 398).

In the case at bar there was no yielding up of possession, but there was what is still stronger: a failure ever to take possession, and there was nonuser, and besides all this, positive evidence of an intent to abandon or not to accept the grant because the grantee acquired a substitute which suited its purposes better.

Dill v. Bd. of Education, 47 N. J. Eq. 421, decides only that *mere nonuser* will not destroy or extinguish an easement arising out of express grant, and the easement in question was a right of way over private, not over public property. It can not be possible that "nonuser," even without more, should in no case be sufficient to constitute abandonment of an easement in a public street. Otherwise the right to lay tracks in a street once granted might have perpetual existence although the grantee never exercised it.

The case of Boston Co. v. Langdon, 24 Pick. 49, involved no question of the abandonment of an easement. It concerned only a question of forfeiture or surrender of the *charter* of a corporation. The case of Canal Company v. R. R. Company, 4 Gill & Johnson, 107, was of the same character and involved the question of *forfeiture* of a *charter* only.

In Hestonville v. City of Philadelphia, 89 Pa. St. 210, there was merely nonuser of one of two tracks for a period of ten years, during which, as the court found, a single track was sufficient for the business. There were no other facts relied upon as evidence of abandonment of the right to use two tracks.

In Roanoke Investment Co. v. Kansas City Co., 108 Mo. 50, it was held that mere nonuser of an easement will not constitute an abandonment, but that if acts are shown of such unequivocal nature as to show a clear intention to abandon, abandonment will be inferred.

And it was further held that abandonment will be more readily inferred when the easement was granted for public purposes than when it was created for private use. And upon the evidence the court held that the railroad company had abandoned the right of way in question.

One of the acts relied upon to show an abandonment was the construction of the railroad over a different route.

Judged by the principles laid down in the foregoing cases the court sitting in this case as a jury to determine a question of intention was fully warranted in finding an abandonment.

The case did not rest upon mere nonuser, but upon testimony of the reasons for the nonuser, of such character that when the secretary of the company was asked what street railway the company "*held*, and was maintaining and operating and *owned* from the foot of the inclined plane," he mentioned only the route as it was actually operated, and made no claim whatever to holding or ownership of rights on Liberty or Walnut Street under the ordinance of December 1, 1871. (Record, pp. 47, 45.)

It is claimed, however, that the use of a track on Walnut Street from Court to Liberty may be referred to the grant of December 1, 1871. But that grant was of the right to double tracks on Walnut Street between those two streets, and as a continuation of the tracks from Liberty Street down, and for use in running both ways, whereas the company used only a single track running in one direction only, so that the single track used on Walnut Street could not be regarded as operated under the ordinance of December 1, 1871. Moreover, the testimony of

Doherty above quoted shows that the company regarded its line from Liberty Street to Fifth Street and back to Liberty Street as being a part of Route No. 8; that Route No. 8 coming into the market about that time it was bought to be used instead of the privileges given by the ordinance of December 1, 1871. Mr. Doherty testified (Record, p. 53): "Q. 89. And so used that (Route No. 8) instead of using the rights passed by the ordinance of 1871?

A. Yes, sir."

And Mr. Doherty also said (Record p. 216.) "Q. There was an old track there which was being used as a part of Route 8 and *is now used as a part of that line?*

A. Yes, sir."

FOURTH.

It is claimed that the city encouraged the Inclined Plane Company in the expenditure of large sums of money in changing its motive power from horses to electricity, and should be estopped to claim the expiration of the privileges granted under the ordinance and contract for Route No. 8.

But the city never required or even requested the company to make the change. The company, of its own volition, sought permission, not of the city council, but of the Board of Public Works, an administrative board, having no power to contract in behalf of the city.

The permission given was not and did not even purport to be a renewal or extension of any grant, and it did not purport to confer any rights upon the company except the privilege to make the changes in motive power, for which the company asked permission of that board. The act of this board, consenting to a change of motive power was a mere regulating act and not a grant of any new or additional easement in the streets. Matter of petition of 3d Ave. R. R. 121 N. Y. 536, 540.

This administrative board had the right to suppose that the railway company knew what its title was, and that it was willing to assume all risks when it asked for nothing more than permission to change its motive power, and did not ask for the renewal of any expired grant.

But there can, in no case, be an estoppel against a municipal corporation by reason of the act of a board not authorized to bind the city by its independent action, even if that board undertakes to contract on behalf of the city.

An implied promise can not be raised against a corporation, where by its charter it can only contract in a prescribed way, except it be a promise for money received or property appropriated under the contract, 2d Dillon on Municipal Corporations (4th ed.), Sec. 459; McCracken v. San Francisco, 16 Cal. 591; Merrill v. Monticello, 138 U. S. 687; Zottman v. San Francisco, 20 Cal. 96; Borough of Milford v. Milford Water Co., 124 Pa. St. 610.

When the mode of contracting by a municipal corporation is prescribed and limited by law, *that mode is exclusive*, and must be pursued, or no liability is incurred by the municipality.

Francis v. City of Troy, 74 N. Y. 338.
Heed v. Providence Ins. Co., 2 Cranch, 127, 169.
Merrill v. Monticello, 138 U. S. 673, 687.
Dillon on Municipal Corporations, sec. 449.

Gutta Percha Co. v. Ogallala, 59 N. W. Rep. 513.
Terre Haute v. Lake, 43 Ind. 480.
Keeney v. Jersey City, 47 N. J. L. 449.
Durango v. Pennington, 8 Col. 257.
Penn v. Laredo, 26 S. W. 636.
City of Bryan v. Page & Sims, 51 Tex. 532.
Butler v. Charlestown, 7 Gray, 12.
Leavenworth v. Rankin, 2 Kansas, 357.
Arnott v. Spokane, 6 Wash. 442.
McDonald v. Mayor, 68 N. Y. 23.
Dickinson v. Poughkeepsie, 75 N. Y. 65.

Under the statutes of Ohio the following procedure is required for the granting of a right to use the streets for railway purposes or for the renewal of any grant.

1st. A recommendation to council by the administrative board.

2d. The passage by both boards of council of an ordinance.

3d. The presentation of the ordinance to the mayor for his approval and his signature thereto, or a failure on his part to return it unsigned within ten days. Revised Statutes, Secs. 1665, 1666, 1667, 2227, 2501, 2502, 3438, 3443.

Not only was there no request by the railway company for a renewal or an extension of the expired grant, but no one of the above mentioned statutory requirements were observed.

The money laid out in making the change to electricity must be taken to have been expended with full knowledge both by the railway company and by the bondholders of the statutes, limiting the powers of the various boards and requiring the observance of the above formalities in making contracts, and, moreover, the Supreme Court of Ohio, in 1877, two years before the first mortgage was made, had decided in the case of State, *ex rel.* Henderson, v. Bell, 34 O. S. 194, that "*the words of the statute requiring the grant to be made by ordinance* to a corporation, individual or individuals therein named *are imperative.*"

Counsel for the petitioner, on page 14 of the petition, refer to the fact that when the railway company made application to the Board of Public Works for permission to change the motive power, "the city solicitor was asked for his opinion upon the subject, which he gave."

But counsel fail to state what that opinion was. As we have already said the Board of Public Works had no power to make, or renew, or extend a grant for the use of the streets either directly or indirectly.

It had no power in the matter except that given to it by implication in the Act of March 30, 1877, which prohibited the use of other motive power than animals, without the consent of the Board of Public Works. Now the city solicitor, in his opinion given to the Board of Public Affairs, the successor of the Board of Public Works, reported that, by granting the permission for a change of motive power, the city's rights against the railway company for the payment of car licenses or percentages on gross earnings would not be waived, and further, that "he is not, at this time, prepared to report on the claim of said company that it is operating its entire lines under the steam railway act, and, therefore, exempt from the payment of car licenses and percentages, but will endeavor to report on that branch at an early day." This opinion of the city solicitor was a part of the same proceedings as the resolution granting permission to use electricity as a motive power (Record, page 93).

By this opinion the company was notified that the Board of Public Affairs did not concede the company's claim that it was operating its entire line under the steam railway act and, therefore, was exempt from the liability to pay the car licenses provided for in the ordinance and contract with Roberts for Route No. 8. The fact that the city solicitor reported that the consent of the board to a change of motive power would not be a waiver of the city's claim for these car licenses showed that the board did not intend to recognize any right in the railway company to hold Route No. 8 free and discharged from the obligations, and terms, and conditions imposed on the original grantee of that route, and this opinion of the city solicitor advised the railway company that no concession was made by the board of the company's claim that it was operating its entire line under the steam railway act, that is, under the Act of May 1, 1852.

On page 28 of the brief for the petitioner it is said that in practically every instance the attacks on street railroads "come, not from the state, or from the municipality, but from the effort of rival companies to deprive the older organization of what they supposed themselves to be secure in, in order to appropriate the profit to the new company." While it is not charged that such is the case here, we wish to dispel any possible suggestion to that effect.

It is evident from the record that a contest between the city and the Inclined Plane Company was inevitable, since the company claimed immunity from the obligations imposed upon all street railway companies by the general ordinances of the city, adopted in 1859 and 1879 (Record, pages 128–145), such as the liability to pay car licenses and percentages on gross earnings, limitations upon rates of fare and of the duration of the easement, and since the company claimed rights to perpetual use of the streets, such as had never been granted by the city to any street railway company, and the time was bound to come when the city, in the interest of the public, would endeavor to bring the routes operated by the Inclined Plane Company under the same general obligations which were imposed on the owners and operators of other street railway routes.

The lines operated by the Cincinnati Inclined Plane Railway Company occupy an anomalous position, wholly unlike that of any other line, and, while occupying and using the streets where it is a surface line in the same manner as other lines, the company claims to be exempt from all restrictions, obligations, and limitations, such as are always imposed in other cases, and it is to the public interest that this state of things should be corrected as soon as possible.

We respectfully submit that the petition for a writ of certiorari should be denied.

Frederick Hertenstein,
Corporation Counsel of the City of Cincinnati.

J. D. Brannan,
J. C. Healy,
Of Counsel.

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Supreme Court of the United States.

JOHN CHISHOLM, ET AL.,
CLAIMANTS, APPELLANTS,

v.

WILLIAM V. ABBOTT, ET AL.,
LIBELLANTS, APPELLEES.

PETITION FOR WRIT OF CERTIORARI.

JOHN LOWELL,
EDWARD S. DODGE,
JOHN J. FLAHERTY,
Proctors for Claimants, Appellants.

United States Circuit Court of Appeals
For the First Circuit.

JOHN CHISHOLM ET AL., CLAIMANTS, APPELLANTS,
AGAINST
WILLIAM V. ABBOTT ET AL., LIBELLANTS, APPELLEES.

Notice is hereby given that upon the petition of the claimants, appellants, above named, verified the sixth day of November, 1896, and upon all the pleadings and proceedings herein, we shall, on Monday, the 23rd day of November, 1896, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, submit a motion, a copy of which is herewith served upon you, to the Supreme Court of the United States at the Capitol, in the City of Washington.

Boston, November 6th, 1896.

JOHN LOWELL,
EDWARD S. DODGE,
JOHN J. FLAHERTY,
Proctors for Claimants, Appellants.

To Messrs. CARVER & BLODGETT,
Proctors for Libellants, Appellees.

Supreme Court of the United States.

JOHN CHISHOLM ET AL., CLAIMANTS, APPELLANTS,
AGAINST
WILLIAM V. ABBOTT ET AL., LIBELLANTS, APPELLEES.

And now come John Chisholm and William H. Thomas, by John Lowell, Edward S. Dodge and John J. Flaherty, their proctors, and move this Honorable Court for a writ of *certiorari* directed to the Judges of the United States Circuit Court of Appeals for the First Circuit, commanding them to certify and return to this Court all the proceedings had in the suit in admiralty lately tried before them between John Chisholm et al., claimants, appellants, and William V. Abbott et al., libellants, appellees.

JOHN LOWELL,
EDWARD S. DODGE,
JOHN J. FLAHERTY,
Proctors for Petitioners.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of John Chisholm and William H. Thomas for a writ of *certiorari* to the Judges of the United States Circuit Court of Appeals for the First Circuit to bring before the Supreme Court of the United States a certain suit in admiralty wherein they are claimants, appellants, and William V. Abbott and others are libellants, appellees, respectfully shows:

FIRST. On January 14, 1895, William V. Abbott and others, owners of the pilot boat D. J. Lawlor, filed their libel against the fishing schooner Horace B. Parker, whereof your petitioners, John Chisholm and William H. Thomas, were the owners, in the District Court of the United States for the District of Massachusetts, to recover damages sustained in a collision between the D. J. Lawlor and the Horace B. Parker, in Massachusetts Bay, at about twenty minutes before four o'clock on the morning of January 5, 1895.

Your petitioners duly appeared and filed a claim to the said schooner Horace B. Parker, and a stipulation for value, on January 16, 1895, and filed their answer February 9, 1895.

SECOND. The libel contained no allegations whatever regarding the condition of the weather at the time of the collision nor during several hours preceding it; nor did it contain any suggestion of the existence of "fog, mist or falling snow" at any time, nor any specific charge of any fault on the part of the Horace B. Parker in any way related to, or connected with, the existence of "fog, mist or falling snow." (Record, pp. 2, 3.)

The answer was subscribed and sworn to "*on information and belief*," only, by William H. Thomas, one of the claimants, who was also the master of the Horace B. Parker, and who, it appeared at the trial, was not on deck at the time of the collision, and had not been on deck for about thirty minutes preceding it. (Record, pp. 10, 106, 107.)

Said answer alleged among other things "that there was a heavy vapor or mist at the time, and the night was very thick;" and it stated as follows: "And further answering, claimants say that the said collision was caused entirely by the improper conduct and the negligence and want of care of those on board the said pilot boat D. J. Lawlor, in that they had no lookout forward, had no lights set and burning as required by law, did not sound a fog horn or use any other signal required by law under the circumstances, had only one man, if any, on deck at the time of said collision, and did not use proper means and precautions to avoid said collision. (Record, pp. 8, 9.)

Third. On February 25, 1895, the cause came on to be tried before the Honorable Edgar Aldrich, District Judge for the District of New Hampshire, duly assigned to hold the District Court for the District of Massachusetts (Record, p. 11), upon the evidence adduced by the respective parties, and on March 8, 1895, the said District Judge filed a decision in writing (Record, pp. 16-18), in which he held the Horace B. Parker solely in fault for the collision. On the same day an interlocutory decree was entered; on April 22, an order of reference; and on June 11, a final decree was entered for the libellants for the sum of $8414.89 damages, and $203.35 costs. (Record, pp. 10-12.)

Fourth. Upon conflicting testimony, the District Judge held "that the lights of the pilot boat were properly set and burning, and that she was not at fault in this respect." (Opinion of District Judge, p. 16.) He also found: "There is some evidence tending to show that the torches lighted subsequently to the collision, for the purpose of clearing the deck of the fisherman, disclosed vapor passing over the deck of the vessel, but upon the trial neither party distinctly claims that the conditions were such as to require the fog signals, and it being conceded that neither was using a fog horn, I am disposed to find that there was no fault in this respect on the part of either vessel." (Opinion of District Judge, p. 18.)

Fifth. From the decree aforesaid of the District Court, your petitioners duly appealed to the United States Circuit Court of Appeals for the First Circuit, which, on January 9, 1896, filed an opinion (Record, pp. 123-125) in which, among other things, it said as follows: "The night was clear overhead, but there is a dispute whether there was not a thick mist on the water" (Record, p. 123). Said court then held, in substance, that the red side light of the pilot boat was not burning at the time of the collision, and that the pilot boat was in fault therefor. But said Circuit Court of Appeals also said (Record, p. 125): "But there is one further difficulty. The answer of the Parker alleges 'that there was a heavy vapor or mist at the time, and the night was very thick,' and it" (the answer) "charges as follows":

> "And further answering, claimants say that the said collision was caused entirely by the improper conduct and the negligence and want of care of those on board the said pilot boat D. J. Lawlor, in that they had no lookout forward, had no lights set and burning as required by law, did not sound a fog horn or use any other signal required by law under the circumstances, had only one man, if any, on deck at the time of said collision, and did not use proper means and precautions to avoid said collision."

"Thus the Parker puts herself in fault by her admission of record; because, if there was such a mist as required the Lawlor to sound her horn, it equally required the Parker to do the same. Is it clear that her failure to do so did not contribute to the collision? We think it is not. If she had sounded a mechanical fog horn, the Lawlor, being to the leeward, might, and probably would, have heard it at a considerable distance and replied with her horn, or shown a flash light or torch sooner, even though she kept her course. The vessels were so short that even two or three seconds saved in this way would have passed the Parker under the stern of the Lawlor. In dealing with this proposition, we do not find it necessary to weigh the proofs on the question whether there was a mist which rose high enough to obscure the lights of these vessels, because the Parker, of her own motion, has so stated the matter on record as to be conclusive against her."

"The decree of the District Court is reversed, and the case is remanded to that court with directions to enter a decree dividing equally the damages and the costs in each court."

SIXTH. Afterward, upon February 18, 1896, your petitioners applied to the said Circuit Court of Appeals for a rehearing of the cause upon the question, among other things, of the conclusive effect of said admission in the answer (Record, p. 129); but on April 23, 1896, an order was made in said court denying a rehearing upon said question (Record, p. 141); (said Court, however, altered the aforesaid judgment regarding costs).

SEVENTH. And, later, upon May 15, 1896, your petitioners applied to the said Circuit Court of Appeals for leave to amend their said answer by striking therefrom the allegations therein, aforesaid, relating to the existence of vapor or mist, and the failure of the libellants to sound fog signals, and thereupon prayed said Circuit Court of Appeals to dismiss said libel (Record, p. 143); and your petitioners, also upon said May 15, 1896, applied to said Circuit Court of Appeals, in the alternative, to certify the questions involved to this Court (Record, pp. 145, 146); but, on May 22, 1896, an order was made in said Circuit Court of Appeals, denying all of said applications (Record, pp. 147, 149).

No mandate has as yet been issued to said District Court.

EIGHTH. Your petitioners aver that this case is one in which it is proper for this Court to issue a writ of *certiorari*, for the following reasons:

1. The questions involved are of peculiar gravity and general importance. They are of great moment to every one drawing a pleading in admiralty.

2. Inasmuch as the libel contains no allegation regarding

the weather, at the time of the collision, or the existence, or non-existence, of vapor or mist, or any charge of negligence on the part of the Horace B. Parker in relation to the use of, or failure to use, a fog horn, the allegations of the answer in regard to all these matters must be considered as *denied* by the libellants.

Admiralty Rules 27, 51.

3. The decision of the Circuit Court of Appeals upon the questions involved is subversive of well settled rules of admiralty pleading and practice, and, if allowed to become a precedent, will be mischievous in its results.

So long ago as 1837, in the frequently cited case *Hutson* v. *Jordan et al.* (1 Ware, 2d Ed., 393, 395-403), WARE, J., considered the question at great length and concluded (p. 401):

"*The answer is carefully to be compared with the allegations of the libel, and with the proofs and the testimony in the case; and the degree of credit, to which it is entitled, must depend on the result of that comparison.*" . . .

In *Cushman* v. *Ryan*, 1 Story 91, STORY, J., cites this decision of Judge WARE, with approval (p. 103). On p. 102, he says: "But, in fact, the defence on this point is not responsive to any allegation in the libel; but it is new matter set up by way of defence to excuse the assault and battery. It is, therefore, strictly matter of fact, to be made out in proof by the respondent."

In the case *The Brig Sarah Ann*, 2 Sumner, 206, the same learned Judge said (p. 209): "It is certainly true, that the proofs and the allegations must coincide; for if there be proofs to facts not put in contestion by the pleadings, or allegations of facts not established by proofs, in each case they must be rejected."

Your petioners were *compelled* by the well established rules of pleading in the admiralty courts to suggest the existence of this vapor, or mist, of which they had been informed; otherwise they would have been excluded from the opportunity of putting in evidence upon the subject at the trial.

"The court has a right to an unreserved and explicit statement on the pleadings of every fact known to the parties, which may be material to the maintenance of the case set up by them respectively, . . . The neglect to supply this guide to the judgment of the court is always to be taken most unfavorably against the vessel omitting it, and the court will be cautious that said reserve shall not be used in her behalf to the surprise of her adversary, so as to permit proofs to be shaped to meet any description of case she may find it advisable to set up on the trial." BETTS, J., in *Pool et al.* v. *The Washington*, 19 Fed. Cases, 1008, p. 1009.

"Nothing is clearer, than that in the then posture of the allegations no proofs were admissible, except to facts put in issue by them; for in all Admiralty proceedings the decree must be *secundum allegata et probata*. It is not sufficient, that there are facts proved, which might have a material bearing, unless there are allegations suited to bring them as matters of plea and controversy before the Court." STORY, J., in *The Schooner Boston and Cargo*, 1 Sumner, 328, p. 331.

"In the courts of admiralty of the United States, although the proofs of each party must substantially correspond to his allegations, so far as to prevent surprise, yet there are no technical rules of variance or of departure in pleading, as at common law; and if a libellant propounds with distinctness the substantive facts upon which he relies, and prays, either specially or generally, for appropriate relief (even if there is some inaccuracy in his statement of subordinate facts, or of the legal effect of the facts propounded), the court may award any relief which the law applicable to the case warrants. Mr. Justice GRAY, in *The Gazelle and Cargo*, 128 U. S. 474, p. 487.

4. In refusing to examine the question of fog or no fog, the Circuit Court of Appeals estops us to deny that there was a fog, and gives the libellants half the damages upon a state of facts which they denied, and which, in this hearing, it must be presumed that they disproved.

See *The East Lothian*, Lush, 241; 14 Moore P. C. C. 177, cited in the accompanying brief, pp. 15,16.

We respectfully submit that no such estoppel has ever been applied unless:

1. The statement was responsive to the allegation of the other party.
2. Or it had been acted on by the other party, to his injury, as by neglecting to produce evidence or the like.
3. If the statement is made upon information and belief, it will not be an estoppel unless the other party has acted on it.

Even when responsive or agreed to by both parties in their pleadings, it may be disproved, if inconsiderately made, if no wrong will thereby be done to the other party.

In *Smith* v. *Fowler*, 12 Lea, 163, the complainant had alleged certain facts and the answer admitted them. These facts were fatal to a part of the complainant's case. The evidence did not support the allegation.

The Court said (p. 171): "While the doctrine of estoppel applies with peculiar force to admissions or statements made upon oath, in the course of judicial proceedings, yet if it satisfactorily appear that the party made such admissions inconsiderately, or without full knowledge of the facts, it is proper that the court should relieve him from the consequences of his error."

In *Allen* v. *Westbrook*, 16 Lea, 251, the same rule was applied to a solemn disclaimer of title.

In *Behr* v. *Conn. Mut. L. Ins. Co.*, 2 Flippin, 692, Judge HAMMOND acted on and upheld a like distinction.

Wherefore your petitioners pray that this Honorable Court will be pleased to grant a writ of *certiorari* in this cause to the United States Circuit Court of Appeals for the First Circuit, to bring this case before this Honorable Court, and for such other relief as to this Honorable Court may seem just.

JOHN CHISHOLM,
WILLIAM H. THOMAS,
Petitioners,
by JOHN LOWELL, EDWARD S. DODGE
and JOHN J. FLAHERTY,
their Proctors.

COMMONWEALTH OF MASSACHUSETTS.

ESSEX, SS. GLOUCESTER, November 6, 1896.

John Chisholm, being duly sworn, says that he is one of the petitioners in the foregoing petition, and is authorized to make this verification on behalf of William H. Thomas, the other petitioner herein, as well as on his own behalf; that he has read said petition and knows the contents thereof, and that the statements of said petition are true to the best of his knowledge, information and belief.

JOHN CHISHOLM.

Sworn to before me this sixth day of November, 1896.

SAMUEL D. HILDRETH,
Notary Public.

[SEAL]

We, John Lowell, Edward S. Dodge and John J. Flaherty, certify that we are proctors for the petitioners, claimants and appellants; that in our opinion the foregoing petition is well founded, both in point of law and on questions of fact; is deserving of judicial consideration, and is not interposed for delay; and that the case is one in which the prayer of the petitioners should be granted.

JOHN LOWELL,
EDWARD S. DODGE,
JOHN J. FLAHERTY.

164-707

Office Supreme Court, U. S.
FILED.
DEC 14 1896
JAMES H. McKENNEY,
CLERK.

164-707

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Supreme Court of the United States.

JOHN CHISHOLM, ET AL.,

CLAIMANTS, APPELLANTS,

v.

WILLIAM V. ABBOTT, ET AL.,

LIBELLANTS, APPELLEES.

BRIEF FOR CLAIMANTS, APPELLANTS,

IN SUPPORT OF PETITION FOR CERTIORARI.

JOHN LOWELL,
EDWARD S. DODGE,
JOHN J. FLAHERTY,
Proctors for Claimants, Appellants.

Supreme Court of the United States.

JOHN CHISHOLM ET AL., CLAIMANTS, APPELLANTS,

AGAINST

WILLIAM V. ABBOTT ET AL., LIBELLANTS, APPELLEES.

ON PETITION FOR CERTIORARI TO BRING UP RECORD.

BRIEF FOR CLAIMANTS, APPELLANTS,

IN SUPPORT OF PETITION.

STATEMENT OF THE CASE.

This suit was brought against the fishing schooner Horace B. Parker, in the District Court of the United States for the District of Massachusetts, to recover damages sustained in a collision between the pilot boat D. J. Lawlor and the Horace B. Parker, in Massachusetts Bay, at about twenty minutes before four o'clock on the morning of January 5, 1895.

The libel contained no allegations whatever regarding the condition of the weather at the time of the collision, nor during several hours preceding it, nor did it contain any suggestion of the existence of "fog, mist or falling snow" at any time, nor any specific charge of any fault on the part of the Horace B. Parker in any way related to, or connected with, the existence of "fog, mist or falling snow." (Record, pp. 2, 3.)

The answer was subscribed and sworn to "*on information and belief*," only, by William H. Thomas, one of the claimants, who was also the master of the Horace B. Parker, and who, it appeared at the trial, was not on deck at the time of the collision, and had not been on deck for about thirty minutes preceding it. (Record, pp. 10, 106, 107.)

Said answer alleged, among other things, "that there was a heavy vapor or mist at the time, and the night was very thick"; and it stated as follows: "And further answering, claimants say that the said collision was caused entirely by the improper conduct and the negligence and want of care of those on board the said pilot boat D. J. Lawlor, in that they had no lookout forward, had no lights set and burning as required by law, did not sound a fog horn or use any other signal required by law under the circumstances, had only one man, if any, on deck at the time of said collision, and did not use proper means and precautions to avoid said collision." (Record, pp. 8, 9.)

The Judge of the District Court found the Horace B. Parker solely in fault for the collision.

Upon conflicting testimony, the District Judge held "that the lights of the pilot boat were properly set and burning, and that she was not at fault in this respect." (Opinion of District Judge, p. 16.) He also found: "There is some evidence tending to show that the torches lighted subsequently to the collision, for the purpose of clearing the deck of the fisherman, disclosed vapor passing over the deck of the vessel, but upon the trial neither party distinctly claims that the conditions were such as to require the fog signals, and it being conceded that neither was using a fog horn, I am disposed to find that there was no fault in this respect on the part of either vessel." (Opinion of District Judge, p. 18.)

The sole witness for the libellant denied that there was any fog, vapor or mist, and there was no testimony upon either side that, at the time of the collision or for half an hour preceding it, there was any fog, vapor or mist.

The Circuit Court of Appeals, upon the same testimony as that which was before the District Court, reversed the decision of the District Court, filing an opinion (Record, pp. 123-125), in which, among other things, it said as follows: "The night was clear overhead, but there is a dispute whether there was not a thick mist on the water." (Record, p. 123). The Court of Appeals then held, in substance, that the red side light of the pilot boat was not burning at the time of the collision, and that the pilot boat was in fault therefor. But the Court of Appeals also said (Record, p. 125): "But there is one further difficulty. The answer of the Parker alleges 'that there was a heavy vapor or mist at the time, and the night was very thick,' and it" (the answer) "charges as follows":

> "And further answering, claimants say that the said collision was caused entirely by the improper conduct and the negligence and want of care of those on board the said pilot boat D. J. Lawlor, in that they had no lookout forward, had no lights set and burning as required by law, did not sound a fog horn or use any other signal required by law under the circumstances, had only one man, if any, on deck at the time of said collision, and did not use proper means and precautions to avoid said collision."

"Thus the Parker puts herself in fault by her admission of record; because, if there was such a mist as required the Lawlor to sound her horn, it equally required the Parker to do the same. Is it clear that her failure to do so did not contribute to the collision? We think it is not. If she had sounded a mechanical fog horn, the Lawlor, being to the leeward, might, and probably would, have heard it at a considerable distance and replied with her horn, or shown a flash light or torch sooner, even though she kept her course. The vessels were so short that even two or three seconds saved in this way would have passed the Parker under the stern of the Lawlor. In dealing with this proposition, we do not find it necessary to weigh the proofs on the question whether there was a mist which rose high enough to obscure the lights of these vessels, because the Parker, of her own motion, has so stated the matter on record as to be conclusive against her."

"*The decree of the District Court is reversed, and the case is remanded to that court with directions to enter a decree dividing equally the damages and the costs in each court.*"

It is respectfully submitted that the Circuit Court of Appeals erred both in giving the effect which it did to the allegations of the answer of the Parker regarding the existence of a vapor or mist at the time of the collision, and also in failing to consider the proofs upon the question whether or not there existed a vapor, mist or fog at the time.

BRIEF OF THE ARGUMENT FOR JOHN CHISHOLM ET AL.,

CLAIMANTS, APPELLANTS, AND PETITIONERS.

The questions presented for the consideration of the Court by this petition are — conscisely stated — as follows:

1. Whether, when the answer of the claimants, in a cause of collision, in admiralty, contains an allegation that there existed vapor or mist at the time of said collision (said allegation not being responsive to any of the allegations of the libel, and not being admitted by the libellants), and charges that the libellants were negligent (among other acts of negligence) in that they did not sound a fog horn, said answer being sworn to upon information and belief only, and it appearing from the testimony that the claimant who so verified the answer had no personal knowledge of the facts so alleged, said allegation, or charge of the negligence of the libellants, constitutes a conclusive admission of negligence on the part of the claimants, if they failed to sound a fog horn, although the testimony in the case negatives the existence of said vapor or mist.

2. Whether, in said cause, the Circuit Court of Appeals having held the vessel of the libellants in fault for failure to exhibit proper side lights, the vessel of the claimants should be condemned for one-half of the damages in said cause, because of the allegation and charge in the answer, above stated, although the testimony in the case failed to prove said allegation.

3. Whether, under the circumstances stated in question 1, above, the Circuit Court of Appeals is justified in refusing to examine the evidence of the existence or non-existence of said vapor or mist.

I.

The effect given by the Circuit Court of Appeals to the allegations of the answer of the Parker regarding the existence of a vapor or mist is in contravention of the settled rules of admiralty pleading and evidence.

The allegations of the answer of the Parker regarding the existence of a vapor or mist, must be considered as denied by the libellants.

Adm. Rule 51.
Gladding v. *Constant*, 1 Sprague, 73.

(*a*) Therefore the existence of "fog, mist, or falling snow", requiring the use of fog signals under Art. 12 of the Revised International Rules and Regulations for preventing Collisions at Sea, was put in dispute, and was one of the issues to be tried and determined upon the evidence, just as though the libellants had denied that there was any such fog, mist or falling snow.

(*b*) It was also in issue whether either of said vessels was in fault for not sounding fog signals, and, if so, whether such fault contributed to the collision.

That both of these points ((*a*) and (*b*) above) were distinctly in issue, is manifest from the opinions both of the District Court and of the Circuit Court of Appeals. The judge who tried the case in the District Court found (Opinion of the District Court, Record, p. 18) "that there was no fault in this respect on the part of either vessel."

In the opinion of the Circuit Court of Appeals (p. 1, Record, p. 123) it is said "the night was clear overhead, but there is a dispute whether there was not a thick mist on the water."

If it is material to find that there was a *mist* instead of a *vapor*, in order to bring the condition of the atmosphere within the precise language of the regulations, "*fog*, *mist*, or *falling snow*", it is submitted that there was no mist properly so-called (which we understand to be a fine rain) in the atmosphere that morning, but that if there was anything, it was a vapor rising from and hovering over the surface of the water. (See 2, pp. 13, 14, below.)

As the Circuit Court of Appeals did "not find it necessary to weigh the proofs on the question whether there was a mist which rose high enough to obscure the lights of these vessels, because the Parker, of her own motion, has so stated the matter on record as to be conclusive against her" (Opinion, Record, p. 125), its opinion that the Parker was in fault, must stand entirely upon the assumption that the allegations of said answer relating to vapor or mist and fog signals are *evidence* of sufficient weight to overcome the testimony in the case, and to conclude the Parker, no matter what, upon a full investigation, may be found to be the actual facts. This we submit is unprecedented, is against the weight of authority, and subversive of that cardinal principle of admiralty procedure,—"The grand object of doing justice between the parties is superior to technical rules and forms.". . . (Benedict's Adm., 3d Ed. § 358, and cases cited.)

(a) It is unprecedented.

After a most thorough search we have been unable to find a single authoritative case, in which there was evidence submitted, where the allegations of the pleadings were construed as admissions, except where the alleged admission was fully supported by the evidence.

The Belle, 6 Ben. 287.

(No evidence submitted.)

Berry v. *The Montezuma*, 3 Fed. Cas. 290.

(An admission of a fact concerning which there was no evidence submitted.)

The Mary C., 1 Hask. 474, p. 475.

(Court found that admission in answer was fully supported by the evidence.)

The Montana, 22 Fed. Rep. 730, p. 733; 22 Blatch. 372, *nom Phenix Ins. Co.* v. *Liverpool and Great Western Steamship Co.*

The amendment offered was to prove the law of Great Britain, which was assumed to require a general appearance to be modified, which was not the case; and was refused for certain technical reasons and because "there was no mistake or misapprehension of fact, and there is no suggestion that the respondent did not know then all it knows now in regard to the facts of the case." The Supreme Court decided the case as if the amendment had been made. (129 U.S. 397, 447; see also *Coffin* v. *Jenkins*, 3 Story, 108.)

The River Mersey, 48 Fed. Rep. 686.

(No evidence submitted. Adm. Rule 51 construed.)

(b) It is against the weight of authority.

1. Facts alleged in the libel or answer, and not supported by the proofs, cannot be considered.

"It is certainly true, that the proofs and the allegations must coincide; for if there be proofs to facts not put in contestation by the pleadings, or allegations of facts not established by proofs, in each case they must be rejected."

The Brig Sarah Ann, 2 Sumn. 206; STORY, J., p. 209.
The Sch. Boston, and cargo, 1 Sumn. 328.
Cushman v. *Ryan*, 1 Story, 91, p. 102.
Hays v. *Pittsburg, G. & B. Packet Co.*, 33 Fed. Rep. 552.
The City of New Orleans, 33 Fed. Rep. 683.
The Morton, Brown's Adm. 137.
Clarke et al. v. *Brig Dodge Healy, and Cargo*, 4 Wash. 651.

"The answer is carefully to be compared with the allegations of the libel, and with the proofs and testimony in the case; and the degree of credit, to which it is entitled, must depend on the result of that comparison."

WARE, J., in *Hutson* v. *Jordan et al.*, 1 Ware, 2d Ed., p. 401.
See also, *The Crusader*, 1 Ware, 2d Ed., 448, p. 454.

The true rule seems to be not to hold parties too strictly to the allegations in their pleadings, but to extract the truth from the record, and found a decree upon it, whenever, by amendment or otherwise, justice can be fully done to both parties.

The Gazelle, and cargo, 128 U.S. 474, p. 487.
The Syracuse, 12 Wall. 167, p. 173.
The Quickstep, 9 Wall. 665.
The Cambridge, 2 Low. 21.

It is elementary that it is the every day practice of the admiralty courts, both appellate and inferior, to either order the pleadings to be amended, or to consider them to be amended to correspond with the proofs.

The Charles Morgan, 115 U.S. 69.
Remington et al. v. *Atlantic Royal Mail Steam Nav. Co.*, 6 Blatch. 153.
Reppert v. *Robinson*, Taney, 492.
Lamb et al. v. *Parkman*, 21 Law. Rep. 589.
The J. E. Trudeau, 54 Fed. Rep. 907, p. 912.
The Rapid Transit, 52 Fed. Rep. 320.
The George Taulane, 22 Fed. Rep. 799.
The Maryland, 19 Fed. Rep. 551, p. 557.
The Morning Star, 14 Fed. Rep. 866.

The only cases which we have been able to find where an amendment for the purpose of making allegations correspond with the evidence, after the case has been heard, has been refused are *The Mary C.*, 1 Hask. 474, *The Iola*, 13 Fed. Cas. 84, *The Montana*, 22 Fed. Rep. 730, where the Court refused to allow the amendments because it was not satisfied that the proposed amendment was in accordance with the truth.

Before leaving this point we desire to ask the Court what is to become of that rule of practice in the admiralty courts requiring a full and frank disclosure of all the material facts known to the parties if this opinion is to stand?

"The court has a right to an unreserved and explicit statement on the pleadings of every fact known to the parties, which may be material to the maintenance of the case set up by them respectively, . . . The neglect to supply this guide to the judgment of the court is always to be taken most unfavorably against the vessel omitting it, and the court will be cautious that said reserve shall not be used in her behalf to the surprise of her adversary, so as to permit proofs to be shaped to meet any description of case she may find it advisable to set up on the trial."

Betts, J., in *Pool et al.* v. *The Washington*, 19 Fed. Cas. 1008, p. 1009.

Take this very case for an example.

The answer was signed and sworn to, *on information and belief only*, by William H. Thomas, one of the claimants of the Parker, and master of her at the time of the collision. He testified that he was in the cabin at the time of the collision and had been there "somewheres around thirty minutes." (Record, p. 106, Q. 6.) That when he was on deck thirty minutes before that "it was thick overhead. The horizon was thick first." The vapor "was going over the vessel when I noticed it." (Record, p. 107, Q. 7-11.)

It thus appears that he did not know and does not undertake to state what the condition of the atmosphere was *at the time of, or for some time before*, the collision.

The master did not know why the lookouts did not see the approaching vessel; it might have been because she had no lights burning, as the Circuit Court of Appeals has found; or it might have occurred to him that possibly the vapor, which he discovered was in the air just after the collision, might have obscured the lights.

Either of these facts, if proved to be true, he had the right to set up, *and in order to avail himself of either of them in defence, he was obliged to set it out in his answer.*

Benedict's Adm., 3d Ed., §§ 465, 486, and cases cited.
The Earnwell, 68 Fed. Rep. pp. 228, 229.
The Rapid Transit, 52 Fed. Rep. 320.
The Morton, Brown's Adm., 137.
Cohan v. *The Rolling Wave*, 6 Fed. Cas. 11.

The fact is, there was some vapor about half an hour before, and immediately after the collision; the captain of the Parker honestly disclosed that fact, the other side withheld it. Should the Lawlor be permitted to profit by her reserve (see BETTS, J., in *Pool et al.* v. *The Washington*, cited above) and the Parker's frankness, on purely technical grounds against the truth and justice? We think not. The true rule we submit is as laid down in 2 Parsons Ship. and Adm. on p. 428:

"If the defendant makes an error, and even a material one, in his answer, he may correct it by a supplemental answer or by an amendment, and the adverse party will not be permitted to profit by it, if the error has been made innocently, and not as a trap."

We respectfully submit that the rule promulgated by the Circuit Court of Appeals in this case, is an old rule of equity pleading and practice which has never been recognized in the admiralty.

> See *Hutson* v. *Jordan et al.*, 1 Ware [385], 2d Ed., 393.
>
> *The Crusader*, 1 Ware [443], 2d Ed. p. 454.

It has never been adopted even in equity, to the extent to which the Circuit Court of Appeals attempts to apply it in this case.

We respectfully submit that no such estoppel has ever been applied unless:

1. The statement was responsive to the allegation of the other party.
2. Or it had been acted on by the other party, to his injury, as by neglecting to produce evidence or the like.
3. If the statement is made upon information and belief, it will not be an estoppel unless the other party has acted on it.

Even when responsive or agreed to by both parties in their pleadings, it may be disproved, if inconsiderately made, if no wrong will thereby be done to the other party.

In *Smith* v. *Fowler*, 12 Lea, 163, the complainant had alleged certain facts and the answer admitted them. These facts were fatal to a part of the complainant's case. The evidence did not support the allegation.

The Court said (p. 171): "While the doctrine of estoppel applies with peculiar force to admissions or statements made upon oath, in the course of judicial proceedings, yet if it satisfactorily appear that the party made such admissions inconsiderately, or without full knowledge of the facts, it is proper that the court should relieve him from the consequences of his error."

In *Allen* v. *Westbrook*, 16 Lea, 251, the same rule was applied to a solemn disclaimer of title.

In *Behr* v. *Conn. Mut. L. Ins. Co.*, 2 Flippin, 692, Judge Hammond acted on and upheld a like distinction.

Bigelow on Estoppel (5th Ed.) p. 722.

"Where, then, no wrong would be done to the court or to other parties to a cause by permitting a change of position, a change should, in principle and will in fact be allowed."

2. We have already shown (pp. 1, 2, 6, above), that the allegations of the answer of the Parker regarding the existence of a vapor or mist are not responsive to any allegations of the libel. They are therefore considered as *denied* by the libellants.

Admiralty Rule 51.
Gladding v. *Constant*, 1 Sprague, 73.

They are also denied by the libellants as matter of fact.

Harrison, the sole witness for the libellants as to the facts of the collision, on direct examination explictly asseverates that the weather was clear. (Record, p. 27, Q. 26, 28; p. 30, Q. 75, 76.) On cross-examination he at first squarely denies that it was "thick" or "misty" (p. 37, X-Q. 181, 182). Later he admits that it was "dark" though clear (p. 38, X-Q. 191-194; pp. 40, 41, X-Q. 240-249). Finally (p. 41, X-Q. 250-261), he admits that there was "vapor" hanging low on the water, such as you always see on intense cold nights, *and that he first noticed it in the morning*, and distinctly says there were "no signs of fog or mist" or snow.

For the claimants:

Bushee testified that after the collision they noticed there was a vapor on the water, but that it was not noticeable until they came on deck with torches after the collision (p. 51, Q. 40-42); that they sounded no fog signals because they did not think it was thick enough (p. 54, X-Q. 96, 97).

Shields testified that there was a vapor at five o'clock in the morning after the collision (p. 69, Q. 33).

Tobin testified that they noticed some vapor on the water, which rose about as high as the deck of the vessel, when they got the torches up after the collision, but could not say that it would obstruct the view of a light (p. 87, Q. 24-36).

The above is *all* the evidence in the case relating to the existence or non-existence of vapor or mist at, or near, the time of the collision.

Not a single witness upon either side testifies that there was any vapor, mist or fog at the time of the collision or for half an hour preceding that time.

Torches brought on deck *after the collision* disclosed some vapor or mist. It would have been a violation of law to bring torches on deck before the collision.

Art 2, Rules and Regulations of 1885 to Prevent Collisions at Sea.

If, then, such vapor or mist existed *before* the collision, inasmuch as the people on neither vessel detected it, it may fairly be assumed that it was not discoverable by ordinarily careful observation.

And if it existed before collision, and was of a nature to obscure lights, the collision should then be ascribed to inevitable accident.

Ralli v. *Troop*, 157 U.S. 386, p. 406, and cases cited.

3. The allegations in question are not verified upon the personal knowledge of any one, but are sworn to "on information and belief," merely, by one of the claimants. As all practitioners in admiralty know, a verification of this character is entitled to weight far different from that attaching to the oath on personal knowledge.

4. The allegations in question did not operate, in any sense, as a surprise to the libellants.

As already shown, their testimony negatives the existence of any vapor or mist; their libel alleges none, nor any fault on the part of the claimants in not sounding fog signals. Nor has it ever been argued that the claimants were in fault in this respect.

See Opinion of ALDRICH, J., Record, p. 18.

The judge of the District Court found that there was no such fog (Record, p. 18); the Circuit Court of Appeals has substantially found the same thing, in finding the material point for the decision of this case to be whether or not the red side light of the Lawlor was burning.

5. In refusing to examine the question of fog or no fog, the Circuit Court of Appeals estops us to deny that there was a fog, and gives the libellants half the damages upon a state of facts which they denied, and which, in this hearing, it must be presumed that they disproved.

It is entirely clear that the libellant can not recover damages excepting upon his own allegations, and the proofs in support of them from whatever side they come.

The rule of *allegata et probata* applies chiefly to the libellant.

The East Lothian, Lush. 241; 14 Moore, P. C. C. 177.

This is a decision of the Privy Council. The libellants, owners of the Laurel, having the right of way, stated that they kept their course. The claimants, owners of the East Lothian, alleged that the collision and the damages caused thereby were solely and entirely caused by the Laurel having starboarded.

The judge of the Admiralty Court held the claimants to this allegation, and treated it as raising the only issue in the case, but found as a fact that the Laurel did starboard and dismissed the libel.

The Privy Council found that the Laurel did not starboard; but added (p. 249), "the reason of the rule" [of holding the libellant to his allegations] "altogether fails in its application to the defense of the vessel proceeded against." . . . "He" [the libellant] "must rely upon the establishment of his own case, and not upon the failure of his adversary; and must succeed upon the truth of his own allegation, or not at all."

II.

Certain of the conclusions of fact stated by the Circuit Court of Appeals in its opinion as tending to show that the failure to sound a mechanical fog horn —(on the assumption that such a fog existed as to require the sounding of a fog horn)— contributed to the collision, are not warranted by any evidence or presumptions in the case.

(*a*) It is stated in the opinion that the Lawlor was to the leeward of the Parker.

This is certainly erroneous. The wind was N.W. (See Opinions, pp. 16, 123.)

The Lawlor, therefore, if close hauled on the starboard tack, was heading W. by S. The Parker was heading N. by E.

It is apparent, therefore, that the Lawlor, although to the "starboard of the Parker" (Opinion, p. 123), was not to the leeward of the Parker, and that under these circumstances a northwest wind would strike the Lawlor before it reached the Parker, and would carry any sound made on board of the Parker away from the Lawlor and not to her. Consequently, if the Parker had sounded a mechanical fog horn, the Lawlor could not in any human probability have heard it on such a night.

(*b*) The suggestion in the opinion that, if the Parker had sounded a mechanical fog horn, the Lawlor probably would "have shown a flash light or torch sooner," is, we submit, a consideration which should not be weighed against the Parker, inasmuch as the showing of such a torch would have been (and was) a misleading and illegal act. (See Revised International Rules and Regulations for Preventing Collisions at Sea, Art. 2, Art. 3, Art. 9, Art. 11.)

(*c*) The libellants, appellees, have in no place, or at any time, claimed that the Parker was in fault in not sounding a fog horn, or that her failure to do so contributed in any manner to the collision. Neither the liberal specification of alleged faults on the part of the Parker in the libel (Art. 4, p. 3, Record), nor the testimony of any witness for the libellants, contains any such suggestion (and see Opinion District Court, Record, p. 18).

Therefore the matter failed of argument in both the District Court, and in the Circuit Court of Appeals.

III.

The questions involved are of peculiar gravity and general importance. They are of great moment to every one drawing a pleading in admiralty, and the principles in question present themselves whenever any pleading in admiralty is attempted.

IV.

A writ of certiorari should be granted herein.

JOHN LOWELL,
EDWARD S. DODGE,
JOHN J. FLAHERTY,
Proctors for CHISHOLM *et al.*, *Petitioners.*

November, 1896.